In the Supreme Court of the United States

Supreme Court, U. S.
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No. 5, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA,

Defendant.

CALIFORNIA'S OPENING BRIEF IN SUPPORT OF ITS PETITION FOR THE ENTRY OF A THIRD SUPPLEMENTAL DECREE

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UNITED STATES OF AMERICA,

Plaintiff,

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CALIFORNIA'S OPENING BRIEF IN SUPPORT OF ITS PETITION FOR THE ENTRY OF A THIRD SUPPLEMENTAL DECREE

Jurisdiction

This action was originally instituted by the United States against the State of California under the authority of Article III, Section 2, Clause 2 of the Constitution of the United States. In supplemental decrees entered by this Court on Jan-January 31, 1966 and June 13, 1977, this Court retained jurisdiction to entertain such further proceedings, to enter such orders, and to issue such writs as were deemed necessary or advisable to give proper force and effect to these decrees or to effectuate the rights of the parties in the premises.

United States v. California, 382 U.S. 448, 453 (1966) (paragraph 14) and ____ U.S. ____, 97 S.Ct. 2915, 2916 (1977) (paragraph 3). Referring to the boundary line between the submerged lands of the United States and the submerged lands of the State of California, paragraph 13 of the 1966 decree provided:

> " . . . As to any portion of such boundary line or of any areas claimed to have been reserved under § 5 of the Submerged Lands Act as to which the parties may have been unable to agree, either party may apply to the Court at any time for the entry of a further supplemental decree."

In urging the entry of a proposed third supplemental decree, the State of California invokes the jurisdiction reserved by this Court in the supplemental decree of January 31, 1966. The parties have been unable to agree as to the extent of each sovereign's jurisdiction over and ownership rights in the areas covered by the proposed supplemental decree. The areas of disagreement involve not only a portion of the boundary line between state and federal submerged lands but also areas claimed by the United States to have been reserved under Section 5 of the Submerged Lands Act, 67 Stat. 32, 43 U.S.C. § 1313.

Questions Presented

1. Did the 1949 Presidential Proclamation which enlarged the Channel Islands National Monument add any tidelands, submerged lands, or waters of the Pacific Ocean to the monument?

2. If the 1949 proclamation did add tidelands, submerged lands or waters of the Pacific Ocean to the monument, were these lands or waters "presently and actually occupied under claim of right" by the federal government on May 22, 1953, and therefore excepted from the operation of the Submerged Lands Act?

Statutes Involved

The statutes involved are set forth in the Appendix to this brief. References to this Appendix in the brief will be referred to by the abbreviation "App."

Additional Proclamations and Executive Orders Involved

The principal Presidential Proclamations involved on this petition for entry of a third supplemental decree are re printed in the agreed Joint Appendix. Additional proclamations and executive orders cited in the brief are reprinted in the Appendix to this brief.

STATEMENT OF THE CASE

On April 26, 1938, President Franklin Delano Roosevelt established the Channel Islands National Monument by Proclamation No. 2281, 52 Stat. 1541 (1938).[1] Except for several lighthouse reservations and the express exclusion of Cat Rock, the original boundaries of the Channel Islands National Monument included only the land area of Anacapa (actually a group of three islets) and Santa Barbara Islands located off the mainland of southern California. Since California's admission to the Union, these two islands together with the islets and rocks surrounding them have been public lands of the United States located within the political boundaries of both the United States and the State of California.

On October 27, 1947, this Court entered its decree that the United States was possessed of "paramount rights in, and full dominion and power over, the lands, minerals and other

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[1] Proclamation No. 2281 is reprinted in the Joint Appendix (Jt. App. 7-8.) Throughout this brief, reference to the Joint Appendix will be abbreviated "Jt. App." with the specific page numbers set forth in Arabic numerals immediately following this abbreviation.

things" underlying the Pacific Ocean seaward of the ordinary low-water mark on the coast of California to a distance of three nautical miles. *United States v. California*, 332 U.S. 804, 805 (1947). On February 9, 1949, President Harry S Truman enlarged the Channel Islands National Monument to include additional areas. Declaring that "certain islets and rocks situated near Anacapa and Santa Barbara Islands" were required for the proper care, management, and protection of the objects of geological and scientific interest located on lands within the monument, President Truman proclaimed that "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" were added to and reserved as part of the Channel Islands National Monument. Proclamation No. 2825, 63 Stat. 1258 (1949).[2]

On July 27, 1966, then Solicitor General Thurgood Marshall sent a letter to then Attorney General Thomas C. Lynch of California expressing the view that a license recently issued by the California Department of Fish and Game for harvesting kelp at Santa Barbara Island infringed upon the rights of the United States in the Channel Islands National Monument. Referring to the 1949 proclamation, Solicitor General Marshall stated in this letter that:

> " . . . I think there can be no doubt that by thus including the one-mile belt around those islands in the Monument, the United States 'actually occupied' that one-mile belt within the meaning of Section 5 of the Submerged Lands Act, so that it did not pass to the State of California under the Act."

The letter then suggested that, if Attorney General Lynch agreed with this view, they should jointly file a stipulation to that effect with this Court. A proposed stipulation

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[2] Proclamation No. 2825 is reprinted in the Joint Appendix. (Jt. App. 67-68.)

was enclosed with the letter in which California was asked to agree to the following language:

> " . . . the submerged lands and natural resources within one geographical mile from the shore lines of Anacapa and Santa Barbara Islands, as shown on the diagram attached to Presidential Proclamation No. 2825, 63 Stat. 1258, appertain to the United States and are subject to its exclusive jurisdiction and control, and the State of California has no title thereto or property interest therein."

In a reply dated September 19, 1966, Attorney General Lynch stated that " . . . we find that we are unable to agree to this proposed Stipulation." Among the grounds stated for California's inability to concur were the absence of any "present and actual occupation" of the areas in question and the lack of a proper "claim of right" under Section 5 of the Submerged Lands Act of 1953.

Over the years following the proposal of Solicitor General Marshall in 1966, representatives of California and the federal government exchanged further correspondence on the status of the one-mile belt around Anacapa and Santa Barbara Islands. None of this correspondence produced a resolution of the conflicting ownership claims. Therefore, on September 3, 1976, California filed the instant petition for entry of a third supplemental decree. In this petition, California set forth the following basic claim:

> "By virtue of its sovereignty and the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§ 1301-1315, the State of California claims title to and ownership of all tidelands, submerged lands and natural resources between the mean high water line and the furthest extent of the territorial sea surrounding the islands, islets, and rocks located within the Channel Islands National Monument. California further claims the right to manage, administer, develop and use these lands and natural resources

> in accordance with state law. California's rights are limited only by the rights reserved to and retained by the United States in the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§ 1301-1315." (Pet. 5.)

In response to California's petition, the United States filed its own motion for entry of a supplemental decree, proposed supplemental decree and a memorandum in support of the motion of the United States and an opposition to the motion of the State of California.[3] In its response, the United States admitted that "the parties disagree about the extent (if any) of the interest of the United States in the tidelands, submerged lands and natural resources located within the boundaries of the Channel Islands National Monument." (U.S. Motion 2, para. 5.) The United States also admitted that this case properly came within the continuing jurisdiction reserved within paragraph 13 of the June 31, 1966 supplemental decree previously entered in this case. (*Id.*, para. 6.)

In its proposed supplemental decree, the United States claimed ownership of all islands, islets and rocks located within the Channel Islands National Monument, including the tidelands (defined as the lands between the line of mean high water and the line of mean lower low water) surrounding the islands and islets. The United States also claimed to own the submerged lands and natural resources located within one geographical mile of the coastline of Anacapa and Santa Barbara Islands. The United States admitted that California has an interest superior to that of the United States in the submerged lands and natural resources underlying the waters of the Pacific Ocean more than one nautical mile from the coastline of Anacapa and Santa Barbara Islands seaward to a

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[3] The abbreviated reference "U.S. Motion" refers hereinafter to the "Motion for Entry of a Supplemental Decree (No. 2) [now No. 3] and Memorandum in Support of the Motion of the United States and in Opposition to the Motion of the State of California," filed in December 1976.

distance of three nautical miles from the coastline of these islands. (U.S. Motion 4-5.)

In the concluding paragraph of its motion for entry of a supplemental decree, the United States points out that "[d]evelopment and exploitation of valuable natural resources of the seas and submerged lands adjacent to Anacapa and Santa Barbara Islands make it necessary and appropriate now to identify with particularity the interests reserved to the United States under Section 5 of the Submerged Lands Act in and around those islands." (U.S. Motion 3.) California concurs. By claiming title to and jurisdiction over the lands and natural resources within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands, the United States interferes with California's management and administration of a valuable recreational resource. The clear waters of this one-mile belt lie over a rocky shelf which is one of California's most beautiful areas for scuba diving and sport fishing. The federal government's claims of ownership of the one-mile belt are a source of continual interference with California's enforcement of its fish and game laws in the territorial sea surrounding the Channel Islands National Monument. By pressing its claims, the United States also interferes with California's program of leases for the harvesting of kelp in the one-mile belt. The United States' assertion of the right to regulate commercial and sport fishing within the one-mile belt (*see* 36 C.F.R. § 7.84) is in derogation of California's rights under the Submerged Lands Act to manage, administer, develop and use the natural resources of this area. Unless the rights of the State of California are established and declared by this Court, the State of California will continue to suffer irreparable injury for which there is no adequate remedy other than this petition for supplemental decree.

In answer to the United States' motion, California filed a response arguing that the issues involved in the dispute over the one-mile belt surrounding the Channel Islands National Monument could be resolved without the employment of a special master. Subsequently through correspondence ad-

dressed to this Court, the parties stipulated to the submission of this dispute to the Court upon a record comprised of the document contained in the Joint Appendix, which has now been filed with this Court. Further stipulations are set forth on the first two pages of the agreed Joint Appendix.

SUMMARY OF ARGUMENT

The first issue on this petition for a third supplemental decree involves the interpretation of the phrase the "areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" as used in the 1949 Presidential proclamation which enlarged the Channel Islands National Monument. The term "areas" is inherently ambiguous but it most often possesses a connotation of an "extent of surface." In the context of the 1949 proclamation, one may draw conflicting inferences as to what "areas" were included in the enlargement. The preamble manifests an intent to add "certain islets and rocks" near the two principal islands of the monument. The intent to add these islets and rocks is the only clearly expressed purpose in the 1949 proclamation. The diagram attached to the proclamation does, however, raise the possibility of an intent to add more than the islets and rocks.

The executive history of the 1949 proclamation tends to show that there was no intent to include tidelands or submerged lands. The executive history effectively begins in 1947 with the proposal of Biologist Lowell Sumner to add Gull Island to the Channel Islands National Monument. As this proposal progresses through channels in the National Park Service, a decision is made to add all the islets and rocks within one nautical mile of Anacapa and Santa Barbara Islands to the monument. The National Park Service draft of a proposed letter from Secretary of the Interior Krug to President Truman expresses an intent to add waters as well as the islets and

rocks. This reference to waters is dropped in the final version of the letter sent to President Truman. The word "area" is substituted in its place. The proclamation is finally revised by an Assistant Solicitor General on behalf of Attorney General Tom C. Clark. At this stage, the revisions strike from the proclamation the purpose of protecting marine life. This deletion tends to negate any intent to include water areas within the one-mile belt surrounding Anacapa and Santa Barbara Islands. The only purpose of adding these areas would have been to protect plant and animal life in these ocean waters.

Significantly, the executive history of the 1949 proclamation contains not a single word about an intent to include tidelands or submerged lands in the 1949 enlargement. Thus, the only real ambiguity is whether the 1949 proclamation gives the National Park Service jurisdiction over the water areas of the one-mile belt in addition to adding the islets and rocks within that belt to the Channel Islands National Monument.

As a matter of law, the 1949 proclamation cannot be interpreted to have added tidelands, submerged lands or waters of the Pacific Ocean to the Channel Islands National Monument. Since both the 1947 decision and the 1966 supplemental decree in this case confirmed California's ownership of the tidelands along its coastline (including the coastline of islands), the tidelands surrounding Anacapa and Santa Barbara Islands were not "lands owned or controlled by the Government of the United States" which could be placed in a national monument. 16 U.S.C. § 431.

The submerged lands surrounding Anacapa and Santa Barbara Islands had already been reserved "pending enactment of legislation" by Executive Order No. 9633 in 1945. A partial revocation of this executive order was necessary to make any submerged lands beneath the one-mile belt available for inclusion in the national monument. The 1949 proclamation did not expressly or impliedly revoke the 1945 executive order with respect to any of these submerged lands. Hence,

submerged lands could not have been included in the 1949 enlargement of Channel Islands National Monument.

Since submerged lands were not added to the monument, the waters of the Pacific Ocean within the one-mile belt, separate and apart from the lands beneath, could not have been included without exceeding the statutory authorization conferred by the Antiquities Act of 1906. That Act only permits the creation of national monuments on "lands owned or controlled by the Government of the United States." It should be obvious that waters by themselves do not constitute "lands." Ocean waters may be added to a national monument only as incident to the addition of underlying submerged land to the same monument. Thus, the 1949 proclamation cannot be interpreted to include waters without exceeding the statutory authority for the enlargement.

The second issue in this case is whether any tidelands, submerged lands, or water areas in the one-mile belt were excepted from the operation of the Submerged Lands Act as lands "presently and actually occupied under claim of right" in 1953. This exception contained in Section 5 of the Submerged Lands Act is merely a savings clause. The legislative history shows that it was intended only to preserve federal claims not based on the "paramount rights" doctrine from being extinguished by the federal quitclaim contained in Section 3 of the Act. This "actual occupancy under claim of right" exception in Section 5 was not intended to resolve any claim of right in favor of the United States; it merely preserved the claim until it could be resolved in other proceedings.

Furthermore, the legislative history of the Submerged Lands Act makes it clear that a claim of right under this exception was not intended to include any claim resting solely upon the doctrine of "paramount rights" enunciated by this Court in 1949. Only by virtue of the "paramount rights" doctrine could the submerged lands and the superjacent waters of the Pacific Ocean within the one-mile belt have constituted "lands owned or controlled by the Government

of the United States" capable of inclusion in a national monument. The federal government's claim to the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands thus rests solely on the doctrine of paramount rights. The reservation for national monument purposes of lands claimed by virtue of the paramount rights doctrine does not transmute a claim so founded into a claim of right which would then fit within the Section 5 exception.

Therefore, California submits that the proper interpretation of President Truman's 1949 proclamation is that it did not add any tidelands, submerged lands or water areas to the Channel Islands National Monument. Properly interpreted, the 1949 proclamation added only the islets and rocks above high water and within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands. Even if this interpretation were not adopted, the federal government's claim to the tidelands, submerged lands and water areas of the one-mile belt must fail. It is a claim resting solely upon the doctrine of "paramount rights" which was specifically excluded from the operation of the "presently and actually occupied under claim of right" exception set forth in Section 5 of the Submerged Lands Act.

ARGUMENT

I

PROPERLY INTERPRETED, THE 1949 PROCLAMATION DID NOT ADD ANY TIDELANDS, SUBMERGED LANDS, OR WATERS OF THE PACIFIC OCEAN TO THE CHANNEL ISLANDS NATIONAL MONUMENT

A. The Principles of Statutory Construction Govern the Interpretation of Presidential Proclamations

The first question for decision by this Court is one of construing the language of Presidential Proclamation No.

2825, 63 Stat. 1258, which extended the boundaries of the Channel Islands National Monument to include "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands." (*See* Jt. App. 67.) The problem is to ascertain what President Truman intended by the quoted words. In undertaking this task, it is first necessary to determine what principles should guide the process of interpretation.

There is very little authority dealing with the interpretation of Presidential proclamations and executive orders. When, as here, they are promulgated pursuant to an Act of Congress, they appear to be a species of administrative regulation. *See generally*, Neighbors, *Presidential Legislation by Executive Order*, 37 U. Colo. L. Rev. 105 (1964). The only difference from the more typical administrative regulation is that the President, rather than a department or agency head, issues proclamations and executive orders. *See United States v. Eaton*, 144 U.S. 677, 688 (1892). Although administrative regulations have been frequently used as guides to the meaning of statutory provisions, the courts have seldom considered problems involving the interpretation of regulations themselves. 1A Sutherland, *Statutory Construction* (Sands rev., 4th ed., 1973) § 31.06 at 361-62. Even less frequently have the courts dealt with the interpretation of Presidential proclamations and executive orders.

At least two district courts have concluded that the rules of statutory construction apply to executive orders where those orders have the force and effect of law. *Feliciano v. United States*, 297 F. Supp. 1356, 1358-59 (D. P.R. 1969), *aff'd.*, 422 F.2d 943 (1st Cir.), *cert. denied*, 400 U.S. 823 (1970); *United States v. Angcog*, 190 F. Supp. 696 (D. Guam 1961). If this view is correct, it should be equally applicable to proclamations. "The difference between Executive orders and proclamations is more one of form than of substance since in each instance the effective action sought or directed by the document is an exercise of Executive power under article II of the Constitution and must be based on authority

derived from the Constitution or statute." Staff of House Comm. on Government Operations, 85th Cong., 1st Sess., *Executive Orders and Proclamations: A study of a Use of Presidential Powers* 1(Comm. Print 1957). (Footnote omitted).

When faced with the problem of interpreting Presidential proclamations and executive orders, this Court has applied appropriately modified principles of statutory construction without expressly holding that those principles were generally applicable to the interpretation of proclamations and executive orders. In *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965), the doctrine of according great weight to the contemporaneous construction by an administrative agency was utilized to interpret an executive order. On another occasion, this Court examined the executive history of a Presidential executive order to ascertain the meaning of words used in the order. *Cole v. Young*, 351 U.S. 536, 555-56 (1956). *Ex parte Endo*, 323 U.S. 283, 298 (1944), held that construction of a wartime executive order was to be approached in the same manner as construction of legislation in the same field. In yet another case, it was held that a construction favoring the validity of an executive order was to be adopted where more than one construction was possible. *United States v. Chemical Foundation*, 272 U.S. 1, 13 (1926).

From the past practice of this Court, it appears that Presidential proclamations should be interpreted in much the same way as statutes, expecially where Congress has expressly authorized the issuance of a proclamation – here the 1949 proclamation was issued pursuant to Section 2 of the Antiquities Act of 1906, 34 Stat. 225, 16 U.S.C. § 431. (*See* Jt. App. 67.) Proclamations and executive orders based on authority conferred by statute are said to have the force and effect of law. *See, e.g., United States v. Eaton, supra*, 144 U.S. at 688 (1892); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967). Since they have the force and effect of law, it seems especially fitting to use principles of statutory construction as guides to their interpretation. One must allow, of course, for the fact

that traditional "legislative history" is not available as an extrinsic aid to interpretation and must rely instead upon relevant Executive Branch documents. With this qualification, this brief proceeds on the assumption that the rules of statutory construction are generally applicable to the problem of interpreting the language of the 1949 proclamation which enlarged the Channel Islands National Monument.

B. The Word "Areas" Is a General Word of Uncertain Meaning Apart From Context

In Proclamation No. 2825, 63 Stat. 1258 (1949), President Truman added "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" to the Channel Islands National Monument. (Jt. App. 67-68.) As the Court observed in *Caminetti v. United States*, 242 U.S. 470, 485 (1917), "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." Therefore, our initial inquiry must be whether the definition of the word "areas" has a fixed content which may shed light on precisely what President Truman added to the Channel Islands National Monument in 1949.

The Second Edition of the unabridged Webster's New International Dictionary of the English Language (Merriam-Webster, 1961) set forth nine (9) definitions of the word "area." If one discards the obviously inapplicable definitions, there are only four which are potentially relevant here:

> "1. Any plane surface, as of the floor of a room or church, or of the ground within an enclosure; an open space in a building; as the *area* of an amphitheater.
>
> ". . . .
>
> "4. A particular extent of surface; a space on the surface, as of an organism; a region; specif., a tract of the earth's surface; as, vast uncultivated *areas*.

> "5. Extent; scope; range; as, a wide *area* of thought.
>
> ". . . .
>
> "8. *Geom.* The superficial contents of any figure; the surface included within any given lines; superficial extent. . . ."

The Third Edition of the unabridged Webster's New International Dictionary expands the definition of "area" to include in its fifth definition "any particular extent of *space* or surface." (Emphasis added.) In the second part of this same definition, the Third Edition states that "area" may mean "an expanse or tract of the earth's surface." It illustrates this latter usage by giving an example of "a large *area* outside the marshes is submerged."

Corpus Juris Secundum best sums up the inherent ambiguity of the word "area" by stating that it has "a somewhat elastic meaning." The section dealing with the meaning of "area" then continues:

> ". . . Originally it meant a broad piece of level ground. In ordinary use today the word 'area' refers to a particular extent of surface, or simply a surface, a territory, a region, tract, space, or a broad part of land.
>
> "The word 'area' can mean any plane surface, the enclosed space on which a building stands, the sunken space or court giving ingress and affording light to the basement of a building, a particular extent of surface, an inclosed yard or opening in a house, an open place adjoining a house.
>
> "Standing alone, the word 'area' implies nothing as to size; it may be of large or small extent." 6 C.J.S. *Area* 522. (Footnotes omitted.)

Of the various meanings which courts have attached to the word "area," there does not appear to be any case in which the word has been used to include space beneath the

surface of land or water. For example, *In re Incorporation of Village of Oconomowoc Lake*, 264 Wis. 540, 59 N.W.2d 662 (1953), involved a dispute over whether the word "area" in a state statute setting forth the minimum size of a municipality included both land areas and water areas. The court held that the town could include its water areas in computing total area. Thus, the town qualified for incorporation. This case illustrates that even when the word "area" encompasses both land and water, it appears to refer only to the surface of both.

In *Atwood v. Humble Oil & Refining Co.*, 338 F.2d 502, 505 (5th Cir. 1964), the Court of Appeals dealt with the construction of the following provision in an oil and gas lease:

> "at the expiration of said twenty years if oil, gas or other mineral is then being produced from said land, the lessee shall promptly designate and define in writing the *area* or *areas* on which oil, gas and/or other minerals are then being produced, it being contemplated that lessee shall have the right to retain under the terms of the lease the *area* or *areas* included within the geologic structures or formations proven to be productive at the end of said twenty year period . . . ." (Emphasis added.)

The plaintiffs contended that the "area" to be retained by Humble could not be designated by a metes and bounds description on the surface, but rather that Humble had to delimit the pools themselves by drawing their horizontal and vertical bounds. (*Id.* at 505.) The court rejected this interpretation, stating:

> " . . . Plaintiff's argument that the lease requires Humble to make a three-dimensional designation calls for a strained and artificial construction more calculated to ascertain the plaintiff's present desires than the actual intent of the parties when they executed this lease. 'Area' was the basic term for that which was to be designated and is clearly more appropriate for surface measurement than three-dimensional measurements when used in the context of an oil and gas lease." (*Id.* at 506.)

From all of the usages surveyed above, one discerns a connotation of the word "area" distinctly referring to a surface, as opposed to a three-dimensional unit of space. Such a connotation would suggest that the "areas" within the one-mile belt surrounding the islands of the Channel Islands National Monument included the surfaces of the islets and rocks and possibly the waters as well. Only the newer usages found in the Third Edition of Webster's Unabridged Dictionary might include space beneath the surface, such as submerged lands. It is evident, therefore, that the meaning to be ascribed to the word "areas" depends entirely upon the context in which that word is used. Although it usually is synonymous with "surface areas," it appears that the word may be used in particular circumstances to include more than just the surface. An examination of the usage of the word "areas" in the specific context of the 1949 proclamation is necessary to answer the question of whether surface areas alone were intended here.

C. Read as a Whole, the 1949 Proclamation Does Not Clearly Indicate an Intention to Add Anything Other Than the Islets and Rocks Within the One-Mile Belt

Since the term "areas" by itself is a word of uncertain content, we must examine the particular use of that term in the context of the 1949 proclamation. The only statement of purpose found in the 1949 proclamation appears in the first "Whereas" clause of the preamble. That clause states that "certain rocks and islets situated near Anacapa and Santa Barbara Islands" were required for the proper care, space, management, and protection of the objects of geological and scientific interest located on lands within the Channel Islands Monument. The second "Whereas" clause states that it appears to be in the public interest to extend the boundaries of the Monument to include "the hereinafter-described areas

adjacent to the said islands." When this second "Whereas" clause is read in conjunction with the first clause manifesting an intent to add "certain islets and rocks," the possibility arises that "the hereinafter-described areas" might not be the same as the "certain islets and rocks" described in the first "Whereas" clause. The question then becomes: What were "the hereinafter-described areas"?

Since this proclamation was issued pursuant to the Antiquities Act of 1906, 34 Stat. 225, 16 U.S.C. § 431, it must be presumed that President Truman had enlarged the Monument to include only "lands owned or controlled by the Government of the United States" for only such lands may be placed within national monuments. The proviso that this proclamation is "subject to valid existing rights" further implies that lands not owned or controlled by the United States were excepted from the operation of the 1949 proclamation.

The "hereinafter-described areas" mentioned in the second clause of the preamble are defined in the body of the proclamation as the "areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands." As used in the body of the proclamation, the phrase "areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" has two qualifications. First, these "areas" are supposedly indicated on the diagram attached to the proclamation and incorporated by reference as part of it. (Jt. App. 68.) The diagram shows a boundary line encircling Anacapa and Santa Barbara Islands and roughly following the configuration of their coastlines. The line itself does not clear up the ambiguity as to what constitutes the "areas within one nautical mile." When read in conjunction with the first "Whereas" clause of the preamble, this line could simply be an envelope line whose function is to indicate that no islets or rocks seaward of the line were added to the monument by the 1949 proclamation. Such an envelope line is a distinct possibility because it would be more convenient to mark off a one-mile boundary than to identify each and every islet and rock now intended for addition to the monument. Envelope lines have been used to include only rocks and islands in several Presidential executive orders. *See, e.g.*, Exec. Order No. 779 (1908) and Exec. Order No. 5318 (1930), *reprinted in* the Appendix to this brief. In each of these reservations where an envelope line was intended a dotted or dashed boundary line was used on the diagram attached to the 1949 proclamation.

An envelope line was utilized in the diagram accompanying the proclamation which created the Fort Jefferson National Monument. (Jt. App. 5.) Since the 1949 proclamation enlarging the Channel Islands National Monument purportedly was modeled on the proclamation creating the Fort Jefferson National Monument (Jt. App. 51), then the boundary line shown in the diagram attached to the 1949 proclamation should be given the same interpretation given to the line shown in the diagram attached to the proclamation creating Fort Jefferson National Monument. If the line used in the Fort Jefferson proclamation was merely an envelope line, then that fact would be similarly probative of an intent to establish an envelope line in the 1949 proclamation too.

The diagram attached to the 1949 proclamation does not, however, clear up the ambiguity as to what "areas" were added to the Channel Islands National Monument. The parties have stipulated that the acreage figures shown on the diagram are figures which approximate the total surface area of Anacapa and Santa Barbara Islands and one nautical mile of waters surrounding those islands. (Jt. App. 2.) The fact that these acreage figures appear on the diagram raises the possibility that the "areas" within the one-mile belt may include jurisdiction over the waters within the new boundaries and perhaps the submerged lands beneath.

Any possible intention to include submerged lands or water areas within the monument appears to be negated by the second qualification which states that the "areas" added to the monument were "withdrawn from all forms of appropriation under the public-land laws . . . ." As this Court

observed in *Udall v. Tallman*, 380 U.S. 1, 19 (1965), "the term 'public-land laws' is ordinarily used to refer to statutes governing the alienation of public land." The words "public lands" are habitually used in federal legislation to describe lands which are subject to sale or other disposal under general laws. *Borax Consol. Ltd. v. Los Angeles*, 296 U.S. 10, 17 (1935). In 1949, none of the federally controlled submerged lands of the Continental Shelf seaward of the low water line on the coast were subject to "appropriation under the public-land laws." In 1945, all of these lands had been placed under the jurisdiction and control of the Secretary of the Interior "for administrative purposes, pending the enactment of legislation in regard thereto." Exec. Order 9633, 10 Fed. Reg. 12305 (1945), *reprinted in* the Appendix to this brief. Congress had passed no such legislation as of the date of the 1949 enlargement of the Channel Islands National Monument. Since the submerged lands underlying the one-mile belt had already been reserved for other purposes, they were not appropriable public lands in 1949. There is a fuller discussion of the effect of the 1945 executive order below.

Thus, the wording of the 1949 proclamation when read as a whole does not remove the ambiguity surrounding what was meant by the use of the phrase "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands." The preamble identifies only one clear purpose for the enlargement of the Channel Islands National Monument—to extend the boundaries of the monument to include "certain islets and rocks situated near Anacapa and Santa Barbara Islands." This statement of purpose is the only express indication of what the President had in mind when he proclaimed the 1949 enlargement of the monument. The use of the phrases "the hereinafter-described areas adjacent to the said islands" and "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" do not, in and of themselves, suggest an addition of anything other than the islets and rocks situated near the two principal islands. It is only when the attached diagram is taken into account that

there is an ambiguity as to what is intended to be included within the one-mile belt marked off on the map. The acreage figures noted on the diagram may suggest an intent to assert jurisdiction over more than the islets and rocks located within the one-mile belt. In addition to including the surface areas of the islets and rocks, the acreage figures may indicate an intent to add jurisdiction over the water areas (at the very least) or perhaps both the water areas and the submerged lands beneath them. As will be presently shown, however, the executive history of the proclamation shows no intent to add any tidelands or submerged lands to the Channel Islands National Monument. As a matter of law, it will also be demonstrated that neither the submerged lands nor the waters of the Pacific Ocean within the one-mile belt could properly have been added to the monument in 1949 by this Presidential act.

D. The Executive History of the 1949 Proclamation Indicates No Intent to Add Tidelands or Submerged Lands to the Monument and Is Ambiguous as to Water Areas

1. The Original Purpose of the Monument

Since the 1949 proclamation merely enlarged an existing national monument, the executive history of the 1949 action must begin with the 1938 Presidential Proclamation creating the Channel Islands National Monument. (... App. 7-8.) It is reasonable to assume that the enlargement was intended to further the purpose of the existing national monument, a purpose which could not be fulfilled without the addition of more territory.

The preamble to the 1938 proclamation is quite specific in delineating a purpose to protect fossils and geologic features. The first "Whereas" clause of the proclamation notes that

> "... certain public islands lying off the coast of Southern California contain fossils of Pleistocene elephants and ancient trees, and furnish note-

> worthy examples of ancient volcanism, deposition, and active sea erosion, and have situated thereon various other objects of geological and scientific interest . . . ." (Jt. App. 7.)

The second "Whereas" clause states that "it appears that it would be in the public interest to reserve *such lands* as a national monument." (*Id.*) (Emphasis added.)

Thus, the 1938 proclamation manifested a purpose to reserve only lands containing fossils or furnishing "noteworthy examples of ancient volcanism, deposition, and active sea erosion." Other objects of geological and scientific interest were also protected if they were located on these lands.

The addition in 1949 of the islets and rocks located in the one-mile belt around Anacapa and Santa Barbara Islands was clearly consistent with the purpose of protecting geologic features similar to those located on the two principal islands. Inclusion of submerged lands would have been inconsistent with this purpose since any fossils and geological features under the water could not really be protected from the natural forces of the sea. Nor should one impute the intentions of King Canute to either President Truman or the National Park Service. Likewise, an intent in 1949 to add the waters of the Pacific Ocean within the one-mile belt would have been inconsistent with the original purpose of the Channel Islands National Monument. Obviously no fossils or geological features are found in the waters themselves.

Therefore, it appears that only the addition in 1949 of the islets and rocks located within the one-mile belt and overlooked in 1938 was consistent with the original purpose of the monument. Inclusion of tidelands would have been consistent with the original purpose, but it will be shown in a later section of this brief that they were expressly excepted from both the 1938 and 1949 proclamations. If the original purpose was preserved in 1949, then logically submerged lands and water areas were not added to the monument. But the executive history between 1938 and 1949 must be carefully examined to see if there was a change of purpose which would support the inclusion of submerged lands or ocean

waters within the phrase "areas within one nautical mile of Anacapa and Santa Barbara Islands" as used in the 1949 proclamation.

2. Early Proposals for Enlargement

Correspondence as early as January 30, 1941, proposed that "outlying rocks and islets in the neighborhood of the main islands" be added to the monument to afford protection to important wildlife species, such as the sea otter, sea elephants, and fur seals, which preferred these places to the shores of the larger islands. (Jt. App. 10.) This first memorandum noted in closing that "the monument can not be extended to cover the actual surface of the surrounding ocean, although this too would be desirable for protection of these marine mammals." (*Id.*)

In a letter dated April 1, 1941, Superintendent E. T. Scoyen of Sequoia National Park (who then had jurisdiction over the Channel Islands National Monument) informed the Executive Secretary of the Council for Conservation of Whales that "at the present time no funds are allotted for patrol or protection of these islands . . . ." (Jt. App. 12.) His letter continued:

> "Our principal difficulty from a protection standpoint arises in the situation that we are able to give protection to these animals [elephant and fur seals] only as long as they are on our beaches; the moment they slip off into the water we lose control over them. We have had, and probably will continue to have, close cooperation with the State of California in protecting these rare species after they enter the sea." (*Id.*)

3. The First Reference to Fort Jefferson National Monument as an Analogy

In a memorandum dated November 15, 1941, Victor H. Cahalane of the Section on National Park Wildlife made the following observation:

> "... From a perusal of the files it is not apparent that the possibility extending the boundaries of the National Monument to include the surface of the adjacent ocean has ever been considered. It would seem that the boundaries of the Fort Jefferson National Monument which extend a considerable distance from the high and low tide marks of the Dry Tortugas Islands would be a precedent." (Jt. App. 13.)

4. The Legal Opinion That the National Park Service Had No Jurisdiction Below the High Water Mark

A May 31, 1946 memorandum written by Chief Counsel Jackson E. Price of the National Park Service noted that the high water mark was the limit of the administrative jurisdiction conferred on the National Park Service by the 1938 proclamation which established the Channel Islands National Monument. Mr. Price concluded that the Service had no jurisdiction over the waters adjacent to the Channel Islands National Monument. He also indicated that federal jurisdiction over the waters apart from National Park Service jurisdiction pursuant to the 1938 proclamation, depended upon the outcome of the then pending litigation in this Court over federal ownership of submerged coastal lands. (Jt. App. 16-17.)

5. Addition of Gull Island and Other Offshore Rocks—The Reason for Seeking the 1949 Enlargement

The genesis of the 1949 proclamation appears to have been the proposal of Biologist Lowell Sumner to add Gull Island, now Sutil Island, to the Channel Islands National Monument. His March 24, 1947 memorandum notes that Gull Island is about 2,000 feet from Santa Barbara Island and is a detached fragment of that island. His memorandum states that "[i]ts exclusion from the proclamation describing the boundaries of Channel Islands National Monument appears to have been wholly unintentional, and a result of the wording

of the proclamation, rather than the original intent of the investigators of the area, or those who framed the proclamation." (Jt. App. 18-19.)

Sumner's proposal to add Gull Island to the Channel Islands National Monument was approved by his superiors and ultimately by the Director of the National Park Service. (Jt. App. 20-24.) In a memorandum to the Director of the National Park Service dated June 6, 1947, Acting Chief of Lands Richey mentions adding not only Gull Island to the Channel Islands National Monument but also "the off-shore rocks around it and other islands." (Jt. App. 25.) This document also quotes a prior memorandum by a Mr. Vint in which Vint expressed the following view:

> "I think the Channel Island boundaries are inadequate. Some islands should be acquired in their entirety and jurisdiction over the water for some distance (say 1 mile) from shore." (*Id.*)

After this quotation, Mr. Richey has placed the marginal notation, "I doubt if the latter is possible. C.A.R." (*Id.*)

On June 12, 1949, Director Newton B. Drury of the National Park Service informed the Regional Director of Region Four that approval of the Boundary Status Report for Channel Islands National Monument was being withheld "pending further study and a determination of the ownership status of Gull Island and other off-shore rocks and islets within one mile from Santa Barbara and Anacapa Islands." (Jt. App. 27.) In a second memorandum also dated June 12, 1947, Director Drury wrote to the Director of the Bureau of Land Management, inquiring as to the present ownership and jurisdictional status of Gull Island. To determine the feasibility of its addition to the existing monument by a Presidential proclamation under the Antiquities Act of 1906. The memorandum also inquires:

> "In this connection, it is equally desirable that this Service have control of the various offshore rocks and unnamed islets above the surface

and within one-mile radii of both Santa Barbara and Anacapa Islands. Are these regarded as public domain? (Jt. App. 28-29.)

The two memoranda of Director Drury on June 12, 1947, show an intent as of that date to add only the various islets and rocks located above the surface and within the one-mile belt surrounding the two principal islands of the Channel Islands National Monument. At this stage, there was manifestly no intent to add tidelands, submerged lands or water areas. Further memoranda of June 27 and July 7, 1947, also substantiate the limited intent to add only the islets and rocks of the one-mile belt. (Jt. App. 30-32.)

On July 11, 1947, Director Fred W. Johnson of the Bureau of Land Management replied to Director Drury indicating that Gull Island and the other "off-shore rocks and islets above ordinary high tide and within one mile of Santa Barbara and Anacapa Islands" could be added to the Monument. (Jt. App. 32-34.) This memorandum concluded:

> "The reservation for national monument purposes of all rocks and islands within one mile of Santa Barbara and Anacapa Islands would include the rocks and islets mentioned, and Gull Island, and no specific reference to the latter island would be necessary.
>
> "If you wish to have these islands added to the Channel Islands National Monument, the bureau will be glad to prepare an appropriate proclamation. In the event you desire at this time to have the islands withdrawn for national monument classification, a public land order to accomplish this purpose will be prepared." (*Id.*)

It should be noted here that no public land order was ever issued withdrawing these "islands" for national monument classification or any other purpose. *See, passim*, Appendix to 43 C.F.R., covering Public Land Orders issued

between 1947 and 1949. On April 14, 1930, President Herbert Hoover had withdrawn "all unreserved islands, rocks, and pinnacles situated in the Pacific Ocean off the coast of California" for classification and in aid of legislation. Exec. Order 5326, *reprinted in* the Appendix to this brief. This order was in full force and effect with respect to the islets and rocks of the one-mile belt until the 1949 proclamation impliedly effected a partial revocation. *See* discussion, *infra*.

A July 17, 1947 memorandum from J. D. Coffman, Acting Director of the National Park Service, to the Regional Director of Region Four asks for information on the current status of U.S. Coast Guard lighthouse reservations on Anacapa and Santa Barbara Islands. (Jt. App. 35-36.) The memorandum states that "[w]e will be in a position to submit a form of proclamation to add Gull Island and other off-shore rocks and islets to the monument as soon as this information is at hand." (*Id.* at 36.)

In another memorandum to the Regional Director, Region Four, dated November 10, 1947, Director Drury expresses his concern that Navy missile experiments will seriously affect Channel Islands National Monument and states that "I am inclined to believe that there might be some advantage to be gained if we were to proceed at once with the addition to the monument of Gull Island and other off-shore rocks within one mile from Santa Barbara and Anacapa Islands." Director Drury concludes this memorandum by asking, "Would you object if we proceeded to submit a form of proclamation as contemplated originally?" (Jt. App. 37.)

The Regional Director's reply of November 18, 1947, states that "[w]e see no objection to immediate preparation of a proclamation which would enlarge the Monument so as to include Gull Island and other off-shore rocks within one mile of Santa Barbara and Anacapa Islands." The Regional Director also expresses the view that ". . . it is only by such status that there will be recognized authority to protect the wildlife and other values." (Jt. App. 38-39.) Attached to the Regional

Director's November 18 reply is another memorandum from Biologist Lowell Sumner. The Sumner memorandum urges the Service to proceed with the submission of a proclamation adding Gull Island and other off-shore rocks to the monument. It also urges that the Service secure a cooperative agreement from the Navy for protection of the Channel Islands National Monument, apparently because the National Park Service still lacks funds for patrol or protection of these islands. (Jt. App. 40-41; *cf.* Jt. App. 12.)

To this point in 1947, the purpose for seeking a supplemental proclamation is still limited exclusively to adding the islets and rocks overlooked in 1938. In light of the confessed inability of the National Park Service to patrol and protect the islands already under its jurisdiction (*see also* Jt. App. 11-12), it would indeed appear anomalous to ask for jurisdiction over expanses of the Pacific Ocean as well. Yet that is apparently what happened.

6. The Park Service Seeks Waters as Well as Islets and Rocks

On June 16, 1947, Director Drury of the National Park Service informed the Regional Director of Region Four that the National Park Service was proceeding with the preparation of a proclamation to add to the monument "all islets, rocks, and waters within one nautical mile of Santa Barbara and Anacapa Islands excepting, of course, the lighthouse reservations." (Jt. App. 42.) This reference to "waters" is the first time in the executive history of the 1949 proclamation that any mention is made of an intent to include anything other than the offshore islets and rocks within one nautical mile of Santa Barbara and Anacapa Islands.

Apparently the Regional Director of Region Four did not place any significance upon Director Drury's use of the word "waters" in the December 16 memorandum. In his own memorandum to the Superintendent of Sequoia National Park dated December 31, 1947, the Regional Director still

assumes that only Gull Island and the other offshore rocks and islets within one mile are all that the proclamation will add to the monument. (Jt. App. 43-44.)

On January 13, 1948, the Regional Director of Region Four sent a copy of a proposed letter to the President from the Secretary of the Interior suggesting that the President sign a proclamation which would add "Gull Island, and other off-shore islets within one nautical mile, to the Channel Islands National Monument." The Regional Director cautioned the Superintendent that "the enclosed communication is for 'information only' since it has not yet been signed by the Secretary." (Jt. App. 45.)

a. The Draft of Secretary Krug's Request for a New Proclamation

The draft of the letter from Secretary of the Interior Krug to President Truman points out that the 1938 proclamation creating the Channel Islands National Monument did not include " . . . several small islets and rocks, the control of which is essential to the proper protection of the objects of geological and scientific interest, including marine life, for the preservation of which the monument was established." The draft of the letter states that it " . . . would place under administrative control of the National Park Service the islets, rocks, and waters within a distance of one nautical mile from Santa Barbara and Anacapa Islands." (Jt. App. 46-47.) The use of the word "water" in this draft of the Secretary of the Interior's letter suggests that the Regional Director may have misinterpreted the proposed scope of the new proclamation.

b. The Boundary Status Report for 1947

The Boundary Status Report For Channel Islands National Monument, approved July 1, 1948, notes that "It is now proposed to revise the boundaries of the Monument in order to place Gull Island and all islets, rocks and waters within a distance of one nautical mile from Santa Barbara and Anacapa Islands under the administrative control of the National Park Service." (Jt. App. 48.)

7. The Final Draft of Secretary Krug's Letter Substitutes the Word "Area" for "Islets, Rocks, and Waters"—No Mention Is Made of Waters at All

On July 2, 1948, Secretary of the Interior J. A. Krug wrote to President Truman recommending the enlargement of Channel Islands National Monument. As in the draft sent by the Regional Director of Region Four to the Superintendent of Sequoia National Park, the final draft of the Secretary's letter notes that the 1938 proclamation did not include "several small islets and rocks," whose control is important for monument purposes. Importantly, however, there is a revision of the paragraph dealing with the purpose of the proclamation. There is no mention of "waters." This deletion appears to be a significant change from the draft of this letter. Instead, the final draft of Secretary Krug's letter states:

> "I recommend that you sign the attached form of proclamation, which would place under administrative control of the National Park Service the *area within a distance of one nautical mile from the shoreline of Anacapa and Santa Barbara Islands*. This will afford proper protection to the seals, sea lions and sea elephants. Some of these species are rare and need absolute protection if they are not to become extinct in American waters." (Jt. App. 51.) (Emphasis added.)

The substitution of the word "area" for the particularized identification of "the islets, rocks, and waters" may indicate an intent to include only the islets and rocks even though the word "area" is susceptible of a broader interpretation. It should be noted that in earlier correspondence the outlying rocks and islets were thought to be important because wildlife species, such as sea otters, sea elephants and fur seals, preferred to rest on these bits of rocks rather than the shores of larger islands. (*See* Jt. App. 10.) The marine life on these rocks and islets could be protected without general jurisdiction over the one-mile belt.

8. The Analogy to Fort Jefferson National Monument Does Not Support Jurisdiction Over Water Areas or Submerged Lands

Secretary Krug's letter to President Truman also contains another paragraph which was not in the National Park Service Draft. This paragraph reads:

> "Similar protection [for seals, sea lions, and sea elephants] was given to the extraordinary marine life in the immediate vicinity of the Dry Tortugas group of islands off Key West, Florida, when that area was established as Fort Jefferson National Monument by Proclamation No. 2112 of January 4, 1935 (49 Stat. 3430)." (Jt. App. 51.) (Brackets added.)

If Fort Jefferson National Monument was indeed the model for the 1949 proclamation enlarging the Channel Islands National Monument, then use of this model can only support an intent to add only the surface areas of the islets and rocks within the one-mile belt to the Channel Islands National Monument.

The Dry Tortugas Islands, which comprise Fort Jefferson National Monument, were acquired by the United States from the State of Florida by a deed of cession dated September 17, 1846. (Jt. App. 93-94.) Neither the deed of cession nor the acts of the Florida Legislature authorizing this deed[4] contain any cession of jurisdiction over the waters and submerged lands surrounding the Dry Tortugas Islands.

On April 6, 1908, President Theodore Roosevelt placed the Dry Tortugas Islands in the Tortugas Keys Bird Reservation. Exec. Order No. 799 (April 6, 1908), *reprinted in* the Appendix to this brief. Executive Order No. 779 makes it clear that it only reserved "all islands embraced within the

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[4] These Florida statutes are set forth in the Appendix to this brief.

group known as the Dry Tortugas . . . and situated within the areas segregated by a broken line upon the diagram hereto attached and made part of this order . . . ." The elliptical broken line on the diagram attached to Executive Order No. 779 is identical to the elliptical line shown on the diagram attached to Proclamation No. 2112, which created the Fort Jefferson National Monument in 1935. (*Compare* Exec. Order No. 779 *with* Jt. App. 3-5.) The language of the 1908 Tortugas Keys Bird Reservation reserving only islands together with the attached diagram demonstrate that no water areas or submerged lands were included within that reservation.

The preamble of the 1935 proclamation creating the Fort Jefferson National Monument states that the public interest would be promoted by revoking the Tortugas Keys Bird Reservation and two military executive orders and "by including the Dry Tortugas group of islands within a national monument for the preservation of Fort Jefferson and the historic and educational interest contained in such area . . . ." (Jt. App. 3.) President Franklin D. Roosevelt then proclaimed that " . . . the area indicated on the diagram hereto attached and forming a part hereof is reserved from all forms of appropriation under the public-land laws and set apart as the Fort Jefferson National Monument." Since the diagram marking the boundaries of Fort Jefferson National Monument is identical to the diagram attached to the 1906 bird reservation which included only the islands surrounded by the broken line, the identity of the two diagrams strongly suggests an intent to include only the islands shown on the map and not any of the water areas or submerged lands between the islands. This conclusion is fortified by the preamble which manifests only an intent to include "the Dry Tortugas group of islands" within the new Fort Jefferson National Monument.

Since the Fort Jefferson National Monument was the model for the 1949 enlargement of the Channel Islands National Monument, a reasonable inference may be drawn that the broken one-mile line shown on the diagram attached

to the 1949 Channel Islands National Monument Proclamation was only intended to enclose all of the islets and rocks being added to the monument. That interpretation must follow if the one-mile line is to be treated like the similar line in the 1935 Fort Jefferson National Monument proclamation.

If, on the other hand, Secretary Krug's reference to the 1935 proclamation creating the Fort Jefferson National Monument somehow was intended as a citation of precedent for an assertion of jurisdiction over areas of ocean water and submerged land, then his interpretation of the 1935 proclamation was clearly erroneous. The history of the Fort Jefferson proclamation does not show that anything other than the land areas of the Dry Tortugas Islands were ever "lands owned or controlled by the Government of the United States" capable of being placed in a national monument pursuant to 16 U.S.C. § 431. (*See* Jt. App. 95-100.)

9. Secretary Krug's Draft of the 1949 Proclamation Mentions Only the Islets and Rocks

The draft of the 1949 proclamation submitted to the President as an attachment to Secretary Krug's letter is also significant. The second "Whereas" clause of this draft specifically noted that the purpose of the proclamation was to include "several small islets and rocks in the vicinity of Anacapa and Santa Barbara Islands" which the 1935 proclamation did not include. (Jt. App. 53.) The second "Whereas" clause stated that it would be in the public interest to extend the boundaries of the Channel Islands National Monument to include "the areas adjacent to Anacapa and Santa Barbara Islands." This clause differs from the second "Whereas" clause of the 1949 proclamation in that the phrase "hereinafter-described" does not precede the word "areas." This nuance of phraseology suggests an identity between the "areas" mentioned in this clause and the "several small islets and rocks" mentioned in the preceding clause. From the language of the draft proposed by the Secretary of the Interior, one may infer that the islets and rocks were the sum total of what was being added to the monument.

10. The Request for Revisions From the Attorney General

On December 16, 1948, the Assistant Director of the Bureau of the Budget forwarded the proposed proclamation enlarging the Channel Islands National Monument to the Attorney General for such revision as he considered appropriate. (Jt. App. 57-59.) This letter emphasizes the Bureau of the Budget's understanding that the proclamation was adding the "several small islets and rocks" in the vicinity of Anacapa and Santa Barbara Islands to the Channel Islands National Monument. (Jt. App. 57.) As used in the second paragraph of the Bureau of the Budget letter, the word "areas" indicates the understanding that only the "small islets and rocks" omitted from the 1938 proclamation were being added to the Channel Islands National Monument by the proposed proclamation.

11. The Regional Director's Letter

Less than a month before the promulgation of the 1949 proclamation, the Acting Regional Director of Region Four of the National Park Service wrote to the President of the J. W. Sefton Foundation suggesting that " . . . there is some possibility that the monument boundary may be extended to include adjacent waters in order to eliminate the destructive activities of persons who have been shooting from boats." (Jt. App. 60-61.) This letter was probably written without knowledge of the changes made in the final draft of Secretary Krug's letter. No correspondence was found for inclusion in Joint Appendix showing that those changes had been communicated to the Regional Director of Region Four.

12. The Department of Justice Revisions Eliminate Protection of Marine Life as a Purpose of the 1949 Enlargement

In a memorandum dated January 28, 1949, Assistant Solicitor General George T. Washington recommended that then Attorney General Tom C. Clark approve the proposed proclamation as to form and legality. (Jt. App. 62-64.) An

important change was made in the proposed proclamation for enlarging the Channel Islands National Monument. The memorandum of the Assistant Solicitor General states:

> "The proposed proclamation originally stated, in addition to the justifiable grounds for enlarging the monument under the above Act [the Antiquities Act of 1906], a purpose to protect marine life. It has been the opinion of this office that it is doubtful whether the Antiquities Act permits the establishment or enlargement of a national monument to protect plant and animal life (see Department of Justice File 90-1-04-317 and 90-1-04-367.) Hence the language relating to this purpose has been eliminated from the proclamation." (Jt. App. 63.) (Brackets added.)

Any other differences between the draft of the proclamation submitted by Secretary of the Interior Krug to President Truman (Jt. App. 53-55) and the proclamation as issued (Jt. App. 67-68) also appear to have been the result of revisions made by Assistant Solicitor General Washington.

The deletion of any purpose to protect marine life in the waters around the monument has great significance in this case. It tends to negate the possibility that the President intended to add the water areas within the one-mile belt to the Channel Islands National Monument in 1949. The only purpose which would justify the addition of these water areas would have been to protect plant and animal life. Unlike the rocks and islets, the water areas within the one-mile belt were not, in and of themselves, objects of scientific interest situated on federal lands. *See* 16 U.S.C. § 431. Hence the elimination of any purpose to protect plant and animal life strongly suggests that, in the final draft of the 1949 proclamation, there was no intent to add water areas to the Channel Islands National Monument.

Although Assistant Solicitor General Washington's memorandum disavows any change in substance by virtue of

his revision (Jt. App. 63), it is entirely possible that he reached this conclusion by interpreting the proposed proclamation in light of the only expressed purpose in the preamble—to add "several small islets and rocks in the vicinity of Santa Barbara and Anacapa Islands" which were not included in the 1938 proclamation. The disavowal of any change in substance is wholly consistent with that purpose.

The substitution of the word "areas" in the published proclamation for the single "area" contained in the original draft also suggests a possible reference to the multiple surface areas of the "several islets and rocks" rather than to the total surface "area" of the entire one-mile belt.

On January 7, 1949, Attorney General Tom C. Clark transmitted the proposed proclamation as revised by his department to President Truman with his approval as to form and legality. (Jt. App. 65.) On February 9, 1949, President Truman issued Proclamation No. 2825 enlarging the Channel Islands National Monument. (Jt. App. 67-68.)

13. The Absence of Any Reference to Tidelands or Submerged Lands in the Executive History

The most striking fact about the executive history of the 1949 proclamation is that none of the documents expressly mentioned either tidelands or submerged lands as being part of "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands." In all of the documents from the beginning of 1947 until the promulgation of the proclamations on February 9, 1949, there is not a single reference to the first *United States v. California* decision, 332 U.S. 19 (1947). If the President truly intended to add submerged lands to the Channel Islands National Monument in 1949, one would have expected a reference to that decision as a basis for the proclamation. Only by virtue of the paramount rights doctrine enunciated in the 1947 decision would submerged lands have been lands "controlled by the Government of the United States" and thus susceptible of placement

in a national monument. 16 U.S.C. § 431.

14. The Ambiguity of the Word "Areas" Should Be Resolved by Limiting its Scope to the Islets and Rocks in the One-Mile Belt

Most certainly, the islets and rocks within one nautical mile of the two principal islands were added to the Channel Islands National Monument. The executive history of the 1949 proclamation does not, however, satisfactorily answer the question of whether "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" included anything else. While the acreage figures on the diagram attached to the 1949 proclamation might tend to suggest that jurisdiction over water areas was included, the only purpose for including water areas in the monument would have been the protection of plant and animal life. That purpose was expressly eliminated in the Attorney General's final revisions of the proclamation. Thus, there is not only an ambiguity as to what President Truman intended by use of the phrase "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands," but there are also conflicting inferences which may be drawn from the language of the 1949 proclamation and the executive history as to whether water areas were included.

Cole v. Young, 351 U.S. 536 (1956), involved interpretation of a similarly ambiguous executive order. There the Court stated:

> " . . . whatever the practical reasons that may have dictated the awkward form of the Order, its failure to state explicitly what was meant is the fault of the Government. Any ambiguities should therefore be resolved against the Government . . . ." (*Id.* at 556.)

Although the principle enunciated in *Cole v. Young* was set in the context of a job dismissal in the interest of national

security, it should also apply in this case. The United States could have avoided any controversy by the use of explicit language. If it had used explicit language, Congress might well have provided a legislative solution to this controversy when it passed the Submerged Lands Act in 1953.

Construing the ambiguity against the federal government is also consistent with the legislative intent of the Antiquities Act of 1906. Section 2 of that Act provides that the limits of national monuments " . . . in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431. It must be presumed that the President complied with this legislative mandate. Accordingly, any ambiguity in a national monument proclamation must be resolved in favor of narrowing rather than expanding the jurisdiction of the National Park Service unless, of course, it can be shown that "proper care and management of the objects to be protected" by monument status requires an interpretation in favor of additional territory. Since the Channel Islands National Monument was created to protect fossils and unique geological features (*see* Jt. App. 7) and since there was no intent to enlarge the monument for protection of marine life, the exceptional situation is just not present here.

E. The Tidelands Within The Channel Islands National Monument Are Not Part Of The Monument

1. The Past Decisions Have Settled California's Title to the Tidelands

In its proposed supplemental decree, the United States has claimed ownership of the tidelands surrounding the islands and islets located within the Channel Islands National Monument. (U.S. Motion 4.) This claim is surprising since California's ownership of the tidelands surrounding the islands within its political boundaries have already been settled. In the 1966 supplemental decree, this Court adjudged California

to have "the title to and ownership of the tidelands along its coast (*defined as the shore* of the mainland and *of islands*, between the line of mean high water and the line of mean lower low water) . . . ." *United States v. California*, 382 U.S. 448, 452 (1966). (Emphasis added.) Even the 1947 decision favorable to the United States recognized California's ownership of " . . . tidelands down to the low water mark." *United States v. California*, 332 U.S. 19, 30 (1947).

2. Federal Title Is Not Traceable to a Mexican Land Grant

In the memorandum accompanying its proposed supplemental decree, the United States asserted that "There is evidence to suggest that the Channel Islands, possibly including those reserved in the Channel Islands National Monument, were the subject of Mexican land grants." The United States suggested that it might be able to establish its title to the tidelands surrounding the islands of the monument "through these and other routes." (U.S. Motion 10-11.) No such evidence has been placed in the agreed Joint Appendix, which constitutes the record in this proceeding.

Furthermore, there was never any possibility that the United States would be able to establish its ownership of the tidelands around the islands of the Channel Islands National Monument through Mexican land grants. All of the ungranted tidelands in California were ceded by Mexico to the United States pursuant to the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848). These tidelands were held in trust by the United States for the creation of future states and passed to California in fee simple when it was admitted to the Union in 1850. *Borax Consol. Ltd. v. Los Angeles*, 296 U.S. 10, 15 (1935). The only tidelands whose ownership did not vest in California upon statehood were those tidelands granted by the Mexican government to private parties before the Treaty of Guadalupe Hidalgo and confirmed by federal patents issued pursuant to the statutory procedure for settling private land claims in the

State of California. *See* 9 Stat. 631 (1851) and successor statutes. No Mexican land grants were ever confirmed as to the islands located within the Channel Islands National Monument. The only federal patents confirming Mexican land grants on California islands were for the islands of San Diego (at San Diego Bay), Santa Catalina, Santa Cruz, Santa Rosa, and Mare Island (in San Francisco Bay). Bowman, *The Question of Sovereignty over California's Off-Shore Islands*, 31 Pac. Historical Rev. 298 (1962).

Since there were never any Mexican land grants on Anacapa or Santa Barbara Islands, there was no way that the United States could have obtained title to the tidelands surrounding these two islands. The United States would have had to acquire the title to tidelands held by a Mexican grantee (or a successor-in-interest) by purchase or condemnation. These possibilities were precluded by the absence of any Mexican land grants whatsoever on the two islands. Furthermore, the 1938 proclamation creating the Channel Islands National Monument clearly recognized the absence of title to the tidelands – the calls for the exceptions on Santa Barbara Island begin and end at the high water line. (Jt. App. 7-8.) The 1938 proclamation also refers throughout to the reservation of "land" for national monument purposes. (*Id.*) In a memorandum dated May 31, 1946, the Chief Counsel of the National Park Service concluded that "While the proclamation is not entirely specific on the point, I believe that it should be construed to grant administrative jurisdiction to the National Park Service with respect to the lands described therein *only to the high water mark*." (Jt. App. 16.) (Emphasis added.)

3. The Tidelands Were Not "Owned or Controlled" by the United States and Were Expressly Excepted From the 1938 and 1949 Proclamations

Since the United States has never owned the tidelands

located within the Channel Islands National Monument, there was no statutory authority for their inclusion within the monument. The Antiquities Act of 1906 only authorizes the creation of national monuments on "lands owned or controlled by the Government of the United States." 16 U.S.C. § 431. Also the 1938 and 1949 proclamations were both expressly made subject to all "valid existing rights." (Jt. App. 7, 67.) California's ownership of the tidelands around the islands, islets and rocks of the Channel Islands National Monument unquestionably was such "a valid existing right," excepted from the operation of these two proclamations.

4. The Federal Position Produces an Anomaly of Concentric Rings

California's ownership of the tidelands within the Channel Islands National Monument presents an anomaly on the California coastline. Everywhere else along the California coast, California owns both the tide and submerged lands with its jurisdiction extending from the mean high water line to three nautical miles from the line of mean lower low water. If there is federal ownership of the water areas or submerged lands within the one-mile belt surrounding Anacapa and Santa Barbara Islands, then the title situation becomes a bizarre complex of concentric rings. The federal government clearly owns the center rings–all lands above the high water mark on the islands, islets, and rocks. California then owns the second ring, the tidelands surrounding the islands, islets and rocks.[5] Further out, the federal government would have jurisdiction over the third ring from the mean lower low water line to one nautical mile. California would then own and have jurisdiction over the fourth ring from one nautical

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[5] California owns all low-tide elevations since these rocks are tidelands being under water at high tide but above water at low tide. *See United States v. California*, 382 U.S. 448, 450 (1966).

mile to three nautical miles. And finally, the federal government would have jurisdiction over all submerged lands beyond the three-mile limit to the edge of the Outer Continental Shelf. 43 U.S.C. § 1332 (1953).

The upshot is that the federal position would make California's tidelands a virtually useless strip surrounded entirely by areas of federal jurisdiction. On the other hand, California's position would reduce the number of rings and would follow the pattern of state-federal jurisdiction which obtains along the rest of the coast.

F. As a Matter of Law, the Areas Within the One-Mile Belt Could Not Have Included Submerged Lands

1. President Truman Had Already Reserved the Submerged Lands in Executive Order No. 9633

On September 28, 1945, President Harry S Truman proclaimed that " . . . the Government of the United States regards the natural resources of the subsoil and sea bed of the Continental Shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." Pres. Proc. No. 2667, 59 Stat. 884 (1945).

In an accompanying executive order, President Truman ordered that

> " . . . the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States declared this day by proclamation to appertain to the United States and to be subject to its jurisdiction and control, be and they are hereby reserved, set aside, and placed under the jurisdiction and control of the Secretary of the Interior for administrative purposes, pending the enactment of legislation in regard thereto." Exec. Order No. 9633, 3 C.F.R., 1943-48 Comp., 437 (1945), *reprinted in* Appendix to this brief.

While neither the proclamation nor the executive order defined the Continental Shelf, the White House press release issued on the same day described it as "submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 feet) of water . . . . " 4 M. Whiteman, *Digest of International Law*, 758 (1965); 13 Dept. State Bull. 484-85 (1945).

a. The High Seas Contiguous to the Coasts of the United States Include All Submerged Lands of the Territorial Sea

Thus, it is clear that although President Truman refers to the subsoil and sea bed of the Continental Shelf "beneath the high seas," he was using the term high seas in a broad sense to include all ocean waters above the Continental Shelf and not just those waters beyond the three-mile limit. Otherwise, the adjective "contiguous" would make little sense since, under its usually understood definition, the high seas in question would have to touch or be in contact with the coasts of the United States. Webster's New International Dictionary of the English Language (2d ed., unabridged, 1961). Often when the admiralty, maritime or territorial jurisdiction of the United States is at issue the high seas extend outward from the ordinary low water mark. *See, e.g., Murray v. Hildreth*, 61 F.2d 483, 484 (5th Cir. 1932).

In his 1945 annual report, Secretary of the Interior Harold L. Ickes interpreted Executive Order No. 9633 as having placed the entire Continental Shelf under the jurisdiction of his department. His Letter of Transmittal to the President stated that "We have acquired jurisdiction over the Contin-

ental Shelf, which is about 760,000 square miles of underwater land from which we may replenish some of our depleted mineral reserves." 1945 Ann. Rep. Sec'y Int. vi. His letter describes the Continental Shelf in terms which obviously include the three miles closest to the shore:

> "Approximately described, the Continental Shelf is all of the ocean floor around the United States and its Territories that is covered by no more than 600 feet of water. The whole area is almost as large as the area embraced in the Louisiana Purchase, which was 827,000 square miles, and almost twice as large as the original 13 colonies, which was 400,000 square miles. Along the Alaska coastline the shelf extends several hundred miles under the Bering Sea. On the Eastern coast of the United States the width of the shelf varies from 20 miles to 250 miles, and along the Pacific coast it is from 1 to 50 miles wide." (*Id.* at ix-x.)

Secretary Ickes' construction of the 1945 Proclamation and Executive Order is entitled to controlling weight. *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

It should also be noted that the last sentence of Executive Order No. 9633 would not make any sense unless the Order were construed to include all of the Continental Shelf and not just the part of it beyond the three-mile limit. The last sentence of the Executive Order expresses an intent not

> " . . . to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit." Exec. Order No. 9633.

If the 1945 Truman Proclamation and Executive Order No. 9633 did not include the subsoil and sea bed within the three-mile limit, the foregoing language would have been unnecessary. There would have been no way in which either the proclamation or the executive order could have affected litigation relating to ownership of the subsoil and sea bed "within" the three-mile limit. This last proviso of the 1945 executive order simply made it clear that the federal government was placing all of the land which it owned on the Continental Shelf under the jurisdiction of the Secretary of the Interior.

When the 1947 *United States v. California* decision confirmed federal dominion over the subsoil and sea bed of the three-mile belt, the submerged land within that belt had already been reserved by this executive order and was under the jurisdiction and control of the Secretary of the Interior for administrative purposes, pending the enactment of legislation dealing with these lands. The 1952 Annual Report of the Secretary of the Interior bears out this interpretation.

> "The fiscal year 1952 ended without any specific guidance having been provided by the Congress for the executive branch with respect to the administration of the oil and gas deposits contained in the Continental Shelf of the United States. In the absence of such specific guidance, the executive branch has not deemed it feasible during the several years that have elapsed since the rights of the Federal Government in the Continental Shelf were upheld by the Supreme Court in the cases of *United States v. California*, 332 U.S. 19 (1947)), the *United States v. Louisiana* (339 U.S. 669 (1950)), and *United States v. Texas* (339 U.S. 707 (1950)), to do anything more than (1) stipulate with California regarding the continuation of oil and gas operations in the submerged areas along the California coast . . . ; and continuation of oil and gas operations which were in progress off the coasts of Louisiana and Texas at the time when the Supreme Court entered its decree . . . . " 1952 Ann. Rep. Sec'y Int. 431-32.

b. Reservation of the Natural Resources Was the Same as Reserving the Subsoil and Sea Bed in its Entirety

In addition, one should also note that the reservation of "the natural resources of the subsoil and sea bed of the Continental Shelf" was tantamount to reserving the subsoil and sea bed. The subsoil and sea bed have no identity apart from the natural resources of which they are composed: indeed, the subsoil and sea bed are nothing more than a bundle of natural resources.

In testimony before a Senate Committee in 1949, Solicitor General Philip B. Perlman was asked what effect the Continental Shelf proclamation had on the outward boundary of the United States. He replied:

> "That proclamation did not fix any boundary. It, I think, had the effect of notifying the rest of the world that to the edge of the Continental Shelf, the Government of the United States was prepared to claim, did claim, the mineral resources of that area, *from its coast* to the edge of the Continental Shelf." *Hearings Before the Senate Committee on Interior and Insular Affairs on S. 155, S. 1545, S. 1700, and S. 2153*, 81st Cong., 1st Sess. 40 (1949).

In the hearings on the bill which became the Outer Continental Shelf Lands Act, Jack B. Tate, Deputy Legal Advisor of the Department of State, took this same view. The following exchange took place between Mr. Tate and Senator Price Daniel of Texas:

> "**Senator Daniel.** I thank you. That is exactly what I was trying to bring out. For all practical purposes, our Nation has the same rights as if we had used the word 'sovereignty.'
>
> "Now, in the interpretation of the President's proclamation, which is limited to mineral resources of the ground, it seems that both the Secretary of State in the concurrent press release, the Attorney General of the United States in his lawsuits against Texas and Louisiana, and the Supreme Court in its decrees, have treated the proclamation as though it covered the land itself, all of the area of the seabed and subsoil of the Continental Shelf. Is that correct?
>
> "**Mr. Tate.** That is correct.
>
> "**Senator Daniel.** And for all practical purposes, when we claim exclusive jurisdiction and control over the natural resources of the seabed and subsoil, have we not asserted exclusive jurisdiction over the seabed and subsoil itself?
>
> "**Mr. Tate.** For all practical purposes that I can think of, sir.
>
> "**Senator Daniel.** We have?
>
> "**Mr. Tate.** Yes, sir."
>
> *Hearings Before Senate Interior and Insular Affairs Committee on S. 1901*, 83d Cong., 1st Sess. 586 (1953).

Executive Order No. 9633 itself appears to equate the natural resources" with the "subsoil and sea bed" of the Continental Shelf when it expressly disavows any intent to affect the outcome of litigation "between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the Continental Shelf within or outside the three-mile limit."

c. In its 1947 Brief, the United States Interpreted the 1945 Executive Order This Same Way

Lastly, and perhaps most importantly, the original brief of the United States filed in this litigation also interpreted the 1945 Truman Proclamation as covering the natural resources of the submerged lands within the three-mile limit. The brief for the United States filed in January of 1947 stated that:

> "This proclamation, in asserting rights in the sea bed of the Continental Shelf, lays claim to natural resources for many miles beyond the three-mile limit." Brief for the United States in Support of Motions for Judgment at 43, *United States v. California*, 332 U.S. 19 (1947).

This language claiming "rights in the sea bed" recognizes the identity between the "natural resources" reserved in 1945 and the entirety of the sea bed itself. This language also shows that the claim was not only to the three-mile belt but also to submerged lands "many miles beyond."

2. Since the 1949 Channel Islands Proclamation Did Not Expressly Revoke Executive Order No. 9633, No Submerged Lands Were Added to the Monument

As shown in the preceding section, Executive Order No. 9633 reserved all the submerged lands of the Continental Shelf in aid of future legislation and placed them under jurisdiction of the Secretary of the Interior for administrative purposes. The submerged lands within the one-mile belt around Anacapa and Santa Barbara Islands were part of the Continental Shelf included within the 1945 reservation. Thus, these submerged lands were not part of the "areas" added to the Channel Islands National Monument in 1949 unless it can be shown that the 1949 proclamation effected a partial revocation of Executive Order No. 9633 as regards the submerged lands in the one-mile belt.

The 1949 proclamation nowhere mentions Executive Order No. 9633. (*See* Jt. App. 67.) Hence, there was no express revocation of the 1945 reservation. If the submerged lands within the one-mile belt were part of the "areas" added to the monument in 1949, then language of the 1945 proclamation had to effect a partial revocation by implication.

It is a cardinal principle of statutory construction that repeals by implication are not favored. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). When executive orders are involved, revocations by implication should likewise be disfavored. This rule should obtain especially where, as here, this Court must infer a partial revocation from use of the ambiguous word "areas" which might or might not include submerged lands. The principle disfavoring repeals by implication carries special weight when this Court is urged to find a specific statute has been repealed by a more general one. *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1876). An analogous principle should apply when an executive order covering submerged lands must be found to have been partially revoked by general language in a later proclamation adding the "areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" to the Channel Islands National Monument.

In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. *Morton v. Mancari*, 417 U.S. 535, 550 (1974); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 456-57 (1945). Two statutory provisions cannot be said to be in "irreconcilable conflict" unless there is a positive repugnancy between them or they cannot mutually coexist. *Radzanower v. Touche Ross & Co., supra*, 426 U.S. at 155.

Here Executive Order No. 9633 and the 1949 proclamation enlarging the Channel Islands National Monument can mutually coexist without any repugnancy if one merely interprets the word "areas" in the latter not to include sub-

merged lands. "When there are two acts upon the same subject, the rule is to give effect to both if possible . . . . " *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). When two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. *Morton v. Mancari*, 417 U.S. 535, 552 (1974). In this case, there is absolutely nothing in the executive history of the 1949 proclamation to suggest any Presidential intent to add submerged lands to the Channel Islands National Monument. As the earlier review of the executive history pointed out, the relevant documents do not contain a single reference to submerged lands as being part of the "areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands."

By way of contrast, the 1949 proclamation did operate to revoke by implication a prior executive order which had similarly reserved all the islands and rocks off the coast of California in aid of legislation. When California was admitted to the Union in 1850, all the islands, islets and rocks above high water and situated in the Pacific Ocean along the California coast became part of the federal public domain. On August 14, 1930, President Herbert Hoover issued Executive Order No. 5326, which provided that "all unreserved islands, rocks and pinnacles situated in the Pacific Ocean off the coast of California" were temporarily withdrawn from settlement, location, sale, or entries pending classification and in aid of legislation. President Hoover specified that this order was to continue "in full force and effect unless and until revoked by the President or by act of Congress."

The preamble of the 1949 proclamation is quite clear that "certain islets and rocks situated near Anacapa and Santa Barbara Islands" were to be included within the 1949 enlargement of the Channel Islands National Monument. (Jt. App. 67.) In this situation, the provisions of the 1949 proclamation and the 1930 executive order are in irreconcilable conflict. The islets and rocks within the one-mile belt cannot be the subject of both reservations. Therefore, the later proc-

lamation to the extent of the conflict operates as an implied repeal of the former executive order. Also the executive history of the 1949 proclamation is replete with evidence showing an intention to add Gull Island and other islets and rocks to the Channel Islands National Monument. A partial revocation by implication, therefore, squares with a Presidential intention to revoke, which intention cannot be found with respect to submerged lands reserved in Executive Order 9633.

For the foregoing reasons, the "areas within one nautical mile of Anacapa and Santa Barbara Islands cannot be interpreted to have added any submerged lands to the Channel Islands National Monument.

3. Having Been Already Reserved, the Submerged Lands of the One-Mile Belt Were Impliedly Excepted From the 1949 Proclamation

Although the language of the 1949 proclamation will not support an implied revocation of Executive Order No. 9633, one can make a case in the opposite direction that the submerged lands of the one-mile belt were impliedly excepted from the 1949 proclamation. The familiar rule is that lands which have been appropriated or reserved for a lawful purpose are not public and are to be regarded as impliedly excepted from subsequent laws, grants and disposals which do not specifically disclose a purpose to include them. *United States v. Minnesota*, 270 U.S. 175, 206 (1926). In relation to the 1945 executive order, the 1949 proclamation was a "subsequent disposal" of the areas within the one-mile belt. Here again, however, neither the language of the 1949 proclamation nor its executive history discloses any purpose to include submerged lands. The submerged lands were thus impliedly excepted from the 1949 proclamation. Therefore, as a matter of law, the phrase "areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" must be interpreted as excluding the submerged lands under the one-mile belt.

G. The Water Areas of the One-Mile Belt Were Not "Lands" Which Could Be Placed Within A National Monument

The executive history of the 1949 proclamation contains no indication that anyone intended to add the submerged lands of the one-mile belt to the Channel Islands National Monument. Indeed, the preceding section of this brief has shown that the submerged lands had already been reserved and set aside in Executive Order No. 9633 in 1945. Since the 1949 proclamation did not expressly or impliedly revoke this prior 1945 executive order with respect to the submerged lands around Anacapa and Santa Barbara Islands, the 1949 enlargement could not have included these lands.

If the "areas" added to the monument in 1949 included more than the islets and rocks within the one-mile belt, then one must read the 1949 proclamation as reserving for national monument purposes a one-mile belt of Pacific Ocean waters. It must be emphasized that, so read, the 1949 proclamation adds ocean waters to the Channel Islands National Monument while leaving the submerged lands beneath reserved for future legislation enacted by Congress.

Although there are portions of the executive history of the 1949 proclamation which support an intent to add jurisdiction over the waters within one nautical mile of Anacapa and Santa Barbara Islands, California submits that any interpretation which would add the water areas, as separate and distinct from the submerged lands would exceed the statutory authority conferred by the Antiquities Act of 1906. If the inclusion of water areas would have exceeded the statutory authority conferred by the 1906 Act, then this Court must adopt a construction which would limit the 1949 proclamation to areas within the valid scope of statutory authority. *Cf. United States v. Chemical Foundation*, 272 U.S. 1, 12 (1926). Such a limiting construction would require a holding that water areas were not included in the 1949 enlargement.

The express language of the Antiquities Act of 1906

permits the creation of national monuments only upon "lands owned or controlled by the Government of the United States." 16 U.S.C. § 431 (emphasis added). In the ordinary sense, lands do not include waters. The two are wholly separate and distinct concepts. There are, however, certain occasions when the term lands may include rights to water. For example, the reservation of land in Death Valley National Monument has been held to include certain reserved water rights as well. *Cappaert v. United States*, 426 U.S. 128, 138-42 (1976). It would also appear that a reservation including a non-navigable lake situated on public lands would necessarily reserve federal ownership rights in the waters of the lake as well as in the federally-owned lands beneath those waters. *See United States v. Oregon*, 295 U.S. 1, 14 (1935). In both of these cases, waters are included within the reservation only because they are inextricably connected with lands also reserved.

No such connection exists in the reservation made by the 1949 proclamation. If water areas were added to the Channel Islands National Monument in 1949, the waters so added were divorced and severed from the underlying submerged lands. The sparse legislative history of the Antiquities Act does not show any congressional intent to permit the addition of waters alone to a national monument. The one page reporting the debates in the House of Representatives deals with only how much land in the Western States was to be taken off the market. 40 Cong. Rec. 7888 (1906). A National Park Service historian has done the only thorough research regarding the background of the 1906 Act. R. Lee, *The Antiquities Act of 1906*, 44-77 (Nat'l Park Serv., 1970).[6] The Lee study contains no evidence to suggest that there was

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[6] This study by Ronald F. Lee was apparently published for official use only in the National Park Service. It was, however, listed in the Monthly Catalog of United States Government Publications for July 1971, item 11622. The Monthly Catalog gives this publication a Library of Congress card number of 78-612257, meaning that a copy was placed on file with the Library of Congress but that copies were not distributed to the various federal depository libraries.

any congressional intent to authorize the inclusion of water areas in national monuments separate and apart from the land on which those waters were situated. This study observes that in the final version of the bill which became the Antiquities Act of 1906

> " . . . the provisions were made applicable to antiquities situated on any 'lands owned or controlled by the Government of the United States.' Previous bills applied only to the public lands, leaving their applicability to forest reserves, Indian lands, and military reservations uncertain." (*Id.* at 74.)

In summary, California's contention is that the federal government might have been able to include the water areas in the 1949 proclamation if it had included the submerged lands. Since it did not include the submerged lands, the Antiquities Act of 1906 did not authorize the addition of the water areas by themselves. Those national monuments in which water areas have been included support the thesis advanced in this brief.

For example, Glacier Bay National Monument includes inland waters of the State of Alaska. Pres. Proc. of February 26, 1925, 43 Stat. 1988 (1925). This proclamation clearly includes the submerged lands of Glacier Bay which were owned by the federal government in 1925 since Alaska was then a territory. In *Shively v. Bowlby*, 152 U.S. 1, 48 (1894), the Court held that Congress had the power to make grants of land below the high water mark of navigable waters in any territory of the United States. Presumably, the greater power to make grants included the lesser power to reserve these lands for national monument purposes.[7]

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[7] An argument could be made by the State of Alaska that the submerged lands underlying Glacier Bay passed to that State under the Equal Footing Doctrine when it became a state in 1959. By virtue of that doctrine, new states become vested with absolute title to the beds of navigable waterways within their boundaries upon admission to the Union. *See, e.g., Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-78 (1977). Unless Alaska expressly relinquished jurisdiction over the submerged lands of Glacier Bay at the time it was admitted to the Union or thereafter, these lands may have passed to the State of Alaska by operation of the Equal Footing Doctrine. That doctrine is more comprehensive than a grant. And lands reserved by the United States have been held to pass by a statute which discloses a purpose to include the reservation within a grant. *See United States v. Minnesota*, 270 U.S. 181, 206 (1926). An Act of Congress admitting a new State to the Union on an equal footing would appear to manifest a specific purpose to include all lands beneath navigable waters, including those previously reserved by the federal government during the period of territorial stewardship.

Similarly the inclusion of undersea coral reef formations within Buck Island Reef National Monument in the Virgin Islands also involves an exercise of federal power over lands located in territories. Buck Island Reef is located in the Virgin Islands, and its boundaries embrace both the submerged lands and superjacent waters. Indeed, federal jurisdiction over a coral reef is predicated on the fact that the reef is an accretion to the federally-owned bed of the ocean. *United States v. Ray*, 423 F.2d 16, 20-21 (5th Cir. 1970).

Biscayne National Monument includes inland waters and submerged lands of the State of Florida. This monument was created by a special act of Congress, 82 Stat. 1188 (1968) which authorized the Secretary of the Interior to acquire " . . . lands, waters, or interests therein by donation, purchase with donated or appropriated funds, or exchange." If waters are included within this national monument without federal ownership of underlying submerged lands, then the authority for this exceptional situation lies in the special act of Congress authorizing this result. It does not appear, however, that waters were included within this monument separate from the submerged lands beneath them. In any event, the manner in which Biscayne was created suggests that special statutory authority is needed to include waters alone in a national monument. This monument is hardly precedent for interpre-

tating the Antiquities Act in such a way as to achieve the same result by the process of construction.

The only other national monument which might arguably include waters is Fort Jefferson National Monument. As discussed earlier in this brief, the history of Fort Jefferson National Monument discloses no authority for including either waters or submerged lands within that monument. *See* discussion, *supra*.

Thus, there is no instance of national monument jurisdiction over ocean waters without that jurisdiction being exercised as an incident of exercising similar jurisdiction over submerged lands beneath. In other words, jurisdiction over superjacent waters is inextricably connected with jurisdiction over submerged lands beneath. Unless the lands are included within the national monument, the waters are not part of the "lands owned or controlled by the Government of the United States." For this reason, waters alone cannot be added to a national monument.

It might be argued on the basis of two Alaska cases that the word "lands" may also include waters. *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). These cases turn on the peculiar history of the word "lands" as used in federal statutes pertaining to the Territory of Alaska. This point is clearly made in the following quotation from the *Hynes* opinion:

> "... We are convinced that § 2 of the Act of May 1, 1936, authorizes the Secretary of the Interior to include in the Karluk Reservation the waters described in § 2 of Public Land Order No. 128. To interpret the clause 'or any other public lands which are actually occupied by Indians or Eskimos within said Territory' to describe only land above mean low tide is too restrictive in view of the history and habits of Alaska natives in the course of administration of Indian affairs in that territory." 337 U.S. at 111.

Thus, the *Hynes* case makes it clear that both submerged lands and superjacent waters under the Pacific Ocean were included within the Indian reservation boundaries that were the subject of that litigation. This case then supports California's thesis that reservation of submerged lands is essential to the reservation of superjacent ocean waters. The *Alaska Pacific Fisheries* decision also lends support to this proposition. In that case, the Court stated:

> "That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority." 152 U.S. at 87.

In conclusion, the peculiar use of the word "lands" in the Antiquities Act of 1906 does not permit the reservation of waters of the Pacific Ocean by themselves without concurrent reservation of the submerged lands beneath. The two necessarily must go hand in hand. Otherwise a Presidential proclamation including only waters without lands would exceed the legislative authority conferred on the President by the 1906 Act. To avoid such a result in this case, California submits that only one interpretation of the "areas within one nautical mile of Anacapa and Santa Barbara Islands" is permissible. That interpretation is that only the islets and rocks within the one-mile belt and above high water were added to the Channel Islands National Monument in 1949.

II

NONE OF THE TIDELANDS, SUBMERGED LANDS OR OCEAN WATERS WITHIN THE ONE-MILE BELT WERE EXCEPTED FROM THE OPERATION OF THE SUBMERGED LANDS ACT

A. The Submerged Lands Act Returned Everything Other than the Islets and Rocks Above High Water to California's Ownership and Control

Even if the 1949 proclamation were interpreted to include tidelands, submerged lands or ocean waters within the "areas" added to the Channel Islands National Monument, those lands and waters were returned to California when the Submerged Lands Act was enacted in 1953. The language of the Act makes it clear that Congress intended to relinquish all federal interests in the three geographical mile belt of territorial sea along the California coast, with the coast including the shoreline of California islands as well as that of the mainland. This relinquishment was, of course, subject to the exceptions and reservations set forth in Sections 5 and 6 of the Act, but it is important to observe that none of the tidelands, submerged lands or water areas purportedly added to the Channel Islands National Monument in 1949 were excluded from the general coverage of the Act.

The definition of "lands beneath navigable waters" contained in Section 2 of the Act included all tidelands and all submerged lands located between the mean high water line and a line three geographical miles seaward from the "coast line." 67 Stat. 29, 43 Stat. 29, 43 U.S.C. § 1301(a)(2). The 1966 supplemental decree in this case established that the "coast line" described in the Submerged Lands Act included the line of mean lower low water in California islands. *United States v. California*, 382 U.S. 448, 449, para. 2 (1966). Thus, all of the tidelands and submerged lands which may have been included within the one-mile belt surrounding Anacapa and Santa Barbara Islands were definitely included within the

phrase "lands beneath navigable waters" as used in the Submerged Lands Act.

The waters of the Pacific Ocean within the one-mile belt were also included within the coverage of the Submerged Lands Act. Section 2 of the Act provided:

> "(e) The term 'natural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power . . . ." 67 Stat. 29, 43 U.S.C. § 1301(e).

As thus defined, the term "natural resources" manifestly includes the waters of the oceans themselves. The phrase "without limiting the generality thereof," which precedes the enumeration of specific types of natural resources, reflects a congressional intent that the doctrine of *ejusdem generis* not apply. The exception of "water power, or the use of water for the production of power" also strongly indicates that the general term "natural resources" included the water itself as a component part.

The federal quitclaim contained in Section 3 of the Act did not exempt areas within the one-mile belt around Anacapa and Santa Barbara Islands from its plain language. Section 3 provided in its first subsection:

> "(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby subject to the provisions hereof, recognized, confirmed, established,

> and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors of interest thereof . . . ." 67 Stat. 30, 43 U.S.C. § 1311(a).

The second subsection of section 3 of the Submerged Lands Act further provided:

> "(b)(1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, *all* right, title and interest of the United States, if any it has, in and to *all* said lands, improvements, and natural resources . . . ." 67 Stat. 30, 43 U.S.C. § 1311(b)(1). (Emphasis added.)

By its general terms, the Submerged Lands Act thus relinquished to California all federal jurisdiction and ownership rights over the tidelands, submerged lands and waters of the Pacific Ocean within the one-mile belt around Anacapa and Santa Barbara Islands. In at least two prior decisions, this Court has held that the Submerged Lands Act effectively confirmed to the States the ownership of all submerged lands within three miles of their coastlines. *United States v. Alaska*, 442 U.S. 184, 187 (1975); *United States v. California*, 381 U.S. 139, 148 (1965). From the statutory language highlighted above, it should be equally apparent that the Act also effectively confirmed State ownership of all tidelands landward of the coastline up to the high water mark. The Act further confirmed or granted to the States whatever rights the federal government possessed in the ocean waters of the three-mile belt.

Because of the sweeping and comprehensive effect of the Submerged Lands Act, the United States must demonstrate that any areas added to the Channel Islands National Monument in 1949 (other than the islets and rocks above high water) were excepted from the coverage of the Act. In

this effort, the federal government has the burden of proof for, as a general rule, one who claims the benefit of statutory exception has the burden of proving that he falls within the exception. *United States v. Morton Salt Co.*, 386 U.S. 361, 366 (1967). California will devote the remainder of this section to showing why the United States cannot sustain this burden.

B. The Claim of Right Exception Did Not Establish Federal Title Since It Was Only a Savings Clause

In the memorandum accompanying its proposed supplemental decree, the United States contends that any tidelands and submerged lands added to the Channel Islands National Monument in 1949 were excepted from the interests transferred to California by the Submerged Lands Act. The United States bases its contention on the language of Section 5(a) which excepted "any rights the United States has in lands presently and actually occupied by the United States under claim of right." 67 Stat. 32, 43 U.S.C. § 1313. For convenience, California will refer to this language as the"claim of right" exception.

In examining this exception, it is important to note how the claim of right exception differs from all the preceding clauses of the first subsection of Section 5. All of the preceding clauses except from the operation of the Section 3 quitclaim either "tracts or parcels of land" or "lands" of various descriptions. This last clause – the claim of right exception – excepts only "rights." This distinction is important because the "lands" mentioned in the preceding clauses did not pass to the States upon the enactment of the Submerged Lands Act. The claim of right clause, however, did not except "lands presently and actually occupied under claim of right" from transfer to the States. It preserved to the federal government only such rights as it had in these lands. One may infer that even lands actually occupied in 1953 could pass to the States if it were concluded in subsequent litigation that the federal government had no rights to the

lands in question. The legislative history of the claim of right exception supports this inference.

The language of the claim of right exception was added to the Senate bill which became the Submerged Lands Act "at the request of the Department of Justice." Remarks of Senator Cordon, 99 Cong. Rec. 2619 (1953). During committee hearings in the Senate, Attorney General Brownell had advised that "Provision should be made in the statute to make certain that all installations by the States on submerged, reclaimed, or filled or other lands inside the line, belong to the States subject to the navigation servitude; also that all installations and acquisitions of the Federal Government within such area belong to it." *Hearings Before the Senate Committee on Interior and Insular Affairs on S.J. Res. 13, S. 294, S. 107, S. 107 Amendment and S.J. Res. 18*, 83d Cong., 1st Sess. 926 (1953) (hereinafter *Senate Hearings*). Attorney General Brownell submitted the language of Section 5 in response to a question from Senator Anderson requesting language to cover this point. The following exchange took place:

"**Attorney General Brownell.** I would be glad to submit some. I haven't it with me.

"**Senator Anderson.** Do you believe the language in the existing bills is satisfactory on that point?

"**Attorney General Brownell.** I would like to check that point.

"**Senator Anderson.** Again I recognize that you might want to submit the language. I think it would be better if you did submit the language that you thought clearly protected any installations the Federal Government might have, such as the ones that were mentioned the other day by the Secretary of the Navy.

"**Attorney General Brownell.** Is that the wish of the entire committee? Should I take that as a request from the committee?

"**Senator Cordon.** It is entirely proper. If a Senator makes a request, the committee joins in it.

"**Attorney General Brownell.** We will be very glad to do that.

"(The language suggested by the Department of Justice, in response to the foregoing request, reads as follows:)

"**Sec. 5. Exceptions from Operation of Section 3 of S.J. Res. 13.** – There is excepted from the operation of section 3 of this Joint Resolution:

"(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by the United States when the State entered the Union; all lands acquired by the United States by eminent domain proceedings; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and all lands presently occupied by the United States under claim of right;

"(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

"(c) all structures and improvement constructed by the United States in the exercise of its navigational servitude."

Senate Hearings at 935.

Since Attorney General Brownell apparently submitted his proposed wording of Section 5 to the Senate Committee after he had completed his testimony, there is no

direct commentary by him on the specific language of the claim of right clause. In response to a question posed by Senator Kuchel of California, the Attorney General did have this to say about the general purpose of the language he would later submit:

> "**Senator Kuchel.** The only other question I have is with respect to your recommendation No. 4, in which you suggest that provision be made to make certain that all installations by the States on submerged, reclaimed, or filled or other lands inside the line, belong to the States subject to the navigation servitude; further, that all installations and acquisitions of the Federal Government, without any legal title or right whatsoever, were to occupy land located within inland waters so that under the State law which everyone would concede would be applicable, the Federal Government was trespassing on the property. It would, I take it, be impossible for Congress by this statute to declare the Federal Government to be owner of that property, since the Federal Government would have no right by a self-serving declaration in a statute to acquire property. Is that not correct?
>
> "**Attorney General Brownell.** On that statement of facts I should think you would be correct. I think we could make it quite clear in the language which we have been asked to submit now on this fourth point as to just what we mean there.
>
> "**Senator Kuchel.** In other words, I do not think anyone desires to have legislation adopted which would cast any doubt whatsoever upon property legally held in a bona fide manner by the Federal Government, but by the same token I think that we should confine the No. 4 suggestion you make to instances where title has been legally vested in Federal installations located within inland waters.
>
> "**Attorney General Brownell.** *The true purpose of this is to preserve the rights of the Federal Government that they legally possess.*"
>
> *Senate Hearings* at 948.

In the executive session which followed the conclusion of public hearings, the committee members provided further clarification of what Congress intended the claim of right exception to mean. The following colloquy took place on the second day of the executive session:

> "**Senator Cordon.** Well, I call attention to the fact again that there is excepted under this section all lands presently occupied by the United States under claim of right.
>
> "**Senator Kuchel.** What does "claim of right" mean?
>
> "**Senator Cordon.** Well, it means that the United States is in actual occupancy and claims it has a right to the occupancy.
>
> "**Senator Kuchel.** And it permits the United States to keep the property in the absence of a title?
>
> "**Senator Cordon.** No; it does not. It leaves the question of whether it is a good claim or not a good claim exactly where it was before. This is simply an exception by the United States of a voluntary release of its claim, whatever it is. It does not, in anywise, validate the claim or prejudice it.
>
> "**Senator Kuchel.** Why should we recognize it, Senator, any more than any other so-called color or title or claim, as we avoided with respect to claimants that the Senator from Nevada talked about?
>
> "**Senator Cordon.** For the reason that in my opinion, Senator, this land now is not land to which the State has title and we are conveying title. We may except what we will.
>
> "**Senator Kuchel.** In other words, we talk here only

about exceptions from that 3-mile belt outside of the inland waters which we are assigning to, or otherwise, disposing of, to the States?

"**Senator Daniel.** No; this covers all of it, everything.

"**Senator Kuchel.** If it covers everything, Senator, then I would say that we do recognize, by this language, something less than a claim of title.

"**Senator Cordon.** We simply recognize that a claim on the part of the United States exists, and we leave it for the same determination that would be made had no decision of any kind ever been made.

"**Senator Long.** This is to say, as I understand, Mr. Chairman, that wherever any State law has conveyed any land to the United States, that the United States retains that land. And likewise, that where the United States holds lands within the State by law of the United States, the United States retains that land.

"**Senator Cordon.** Yes. And any land occupied by the United States under claim by the United States that it has a right there, is excluded from this conveyance or quitclaim or assignment. That neither validates the claim nor prejudices it. It leaves it where we found it. It is general language that has been suggested by the Department of Justice, and I think it is good.

"**Senator Cordon.** And protects every installation of every kind.

"**Senator Long.** That, in effect, says that this act does not at all affect any land which the United States is actually occupying. And that means that a representative of the United States Government in one capacity or another is occupying that land.

"**Senator Cordon.** That is right.

"**Senator Kuchel.** It will be susceptible to a motion to strike later on.

"**Senator Cordon.** Yes.

"**Senator Daniel.** Are Federal officials now occupying the marginal belt land of Texas and Louisiana under a claim of right?

"**Senator Cordon.** It is not intended that this language shall do that, that it recognizes that as being within the classification. I cannot answer whether someone may believe it is occupancy or not. In my opinion, it is not occupancy, but then I can only give you my opinion. Occupancy to me is some type of actual either continuous possession or possession in such way as to indicate that the individual claims some special right there different from a vast unoccupied area.

"**Senator Long.** I am a little bit afraid of that last clause myself, just on the theory that the clause might be susceptible of interpretation that would complete [sic] negate this entire bill. Where it says "and all lands presently occupied by the United States under a claim of right." That is on the theory that it might be urged that the United States Navy, for example, might be occupying this land under a claim of right.

"**Senator Daniel.** Of course, it is not intended, but let's be sure that nobody else could contend.

"**Senator Cordon.** All right. We can make it more specific by indicating that the claim of right is other than the claim arising by virtue of the decision in the cases of – and put in the citations – and then we will have excluded any claim by virtue of the decisions.

"**Senator Long.** As a matter of fact, as long as it is made clear that this means uplands rather than submerged lands, I would be satisfied, "that all lands occupied by the United States under a claim of right."

"**Senator Cordon.** We will see. We have a note of it. All right."

Senate Hearings, Pt. II, at 1321-22.

Senator Kuchel expressed concern that the claim of right exception might somehow be interpreted as an expression of congressional recognition of the validity of the claims excepted from the operation of the Submerged Lands Act. (*Id.* at 1395.) To this concern, Senator Cordon replied:

> "**Senator Cordon.** What I had in mind is that I believe the Senator, if he will pardon me, is almost exactly wrong as a matter of law. If the Senator will follow me, please. Let us have in mind that this resolution is a transfer by the Federal Government to the States. Of necessity, the Federal Government can, if it so desires, transfer everything it owns in the area – installations and all – or it may except the installations to which it has a perfect title and transfer one where it only claims a title.
>
> "But if we do make the transfer where the Government claims a title, we will have completely taken from the Government any basis upon which it could exert the claim.
>
> "**Senator Kuchel.** Would you contend that if the claim on behalf of the Government was against property in inland waters?
>
> "**Senator Cordon.** Any claim that it had anywhere would pass to the States if it comes within lands under navigable waters, unless the exception were made. It would have no right to urge whatever claim it has.
>
> "Whereas here we have almost exactly the opposite position. Here the Government is transferring its interest in the area, and conceivably such conveyance might include rights the Government does not have as against the other instance where it simply would be transferring the right it claims, and it wants to adjudicate the claim, so it reserves the area which it claims under right, and that claim, of course, is subject to litigation if it is reserved. If it is not reserved, it is not subject to litigation."

(*Id.* at 1396.)

Toward the end of the executive session, Senator Cordon further explained that the claim of right clause was necessary to give the federal government an opportunity to identify the lands to which it had a legitimate claim. He stated:

> "Now, we have nothing left at the moment unless some other matters are to be presented, except that of the Senator from California. The information I have from the Department is that without a most careful check, one that would be somewhat tedious and long drawn out, inasmuch as it might well not only be a check of the records of what is held under claim of right by the United States, but a check perhaps that would possibly go into the field and possibly have to be identified by survey on the ground, that is impossible without that type of full investigation to know that there is not an area or are not areas here and there, either below the inland waters, below low tide, or without inland waters, or in navigable waters that are wholly inland, that there are not areas where the United States is in actual occupancy, and may have expended millions or tens of millions of dollars, but the exact title to which and to all of which is certainly in the United States, with an express showing. They cannot know exactly in other words whether what they occupy is lands to which they have wholly recorded lawful title.
>
> "The purpose of the language was to save for them an opportunity to determine their rights if they are questioned. That of course was my original view of it."

(*Id.* at 1419-20.)

After these remarks by Senator Cordon, it was suggested that the bill be amended to require "actual" as well as "present occupancy." (*Id.* at 1420.) Senator Kuchel

thereafter pointed out that the Navy then occupied without right valuable acreage within the inland waters of the City of Long Beach and that " . . . the question of whether there is an occupancy with right or without right is entirely a matter to be determined under the law of the State of California." (*Id.*) He expressed the view that "There is nothing that we can do by way of language which will assist the Federal Government in perfecting its right or its title if it has one." (*Id.*) This exchange followed:

> "**Senator Cordon.** If the Senator will just understand that if we do not have language of this character then we have extinguished any right it may have had or right to claim it.
>
> "**Senator Kuchel.** Why do you say that, sir, when we are dealing with inland waters?
>
> "**Senator Cordon.** Because we are conveying all interest of the United States in these areas, and unless it is expected it all goes. Therefore, if there is not this sort of an exception we have taken away from the Government its opportunity whether its right is real or fancied, good or bogus, legal or illegal. That is the thing that bothers me.
>
> "I am afraid that I have not yet gotten over the thing I want the Senator to fully understand: The bill is a conveyance. Unless we except from the conveyance a tract of ground, the title of which is in dispute, and unless we except that we end the dispute, but we end it adversely to the United States. We have taken away from the United States any chance to make good on its claim to prevail in court if it voluntarily surreunders [sic] that claim of right."
>
> (*Id.* at 1421.)

Senator Kuchel remained unconvinced that the language of the exception might not be interpreted as validating federal title rather than just preserving the right to litigate claims. He restated his position, and Senator Cordon replied:

> "**Senator Kuchel.** I recognize that we are dealing here with the Federal Government as well as we are with the States, and I don't want any State to be able to impose upon the Federal Government nor do I want the reverse.
>
> "If there is occupancy by the Federal Government rightfully on State property, I want the Federal Government to be able to keep it. If it is there without right, I want it to be in a position so that it will be subjected to the State law in question. I am just afraid that that phrase "claim of right," is loose. I wish there were some other way to permit the protection, and that was the reason that other language was suggested in the other approach.
>
> "**Senator Cordon.** Would the Senator feel better if we left the language as it is, and added after the words "and actually," and then the Senator would have a full opportunity by the time this resolution comes up on the floor to fully go into the matter, particularly as to the legal effect of it, and I assure him for one that I would be glad to go with him in any language that is needed to protect the State that does not cut off an opportunity for the Government to at least litigate whatever claim it has."
>
> (*Id.*)

Further discussion ensued in which Senator Cordon remarked that the Government have never claimed the right to put a military installation in inland waters "until it had title to what it was using." (*Id.* at 1422.) Senator Kuchel asked why the claim of right language was needed if that was a fact, and Senator Cordon answered:

> "**Senator Cordon.** Because of the human frailty involved and the negligence of certain agencies of the Government. There are matters such as building up filled-in lands and constructing facilities on them that have gone on and on for many years, and seemingly

without objection, but as a result of which they now have valuable works, with respect to which they would like at least an opportunity to determine whether there has been any legal right that has ripened as a result of long possession.

"That is as near as I could explain to you what we are up against."

(*Id.*)

The final exchange of remarks at the end of the executive session makes clear that the claim of right exception was only a savings clause, which was not intended to be a congressional validation of federal claims in any way. The exchange was:

"**Senator Kuchel.** Mr. Chairman, would you consider informally first such language as this, and I refer now to a suggested substitute for the last phrase of section 5: "and any rights the United States may have on lands presently occupied by the United States under claim of right.

"Which means that we are saving from assignment or gift as the case may be the rights of the United States which it has occupied under claim of right.

"**Senator Cordon.** Read it again.

"**Senator Kuchel.** "And any rights the United States may have on lands presently occupied by the United States under claim of right." That means that we are preserving to the United States any rights.

"**Senator Cordon.** So far as the Chair is concerned, I will take that language.

"Senator **Kuchel.** I so move.

"**Senator Malone.** That is just like preserving anyone else's rights.

"**Senator Daniel.** How is that?

"**Senator Kuchel.** It is to strike out, on page 12 of the Confidential Committee Print No. 4 –

"**Senator Cordon.** I think we can take care of that, and say "and there is reserved any rights the United States has in lands presently and actually occupied by the United States under claim of right:" The United States cannot ask for more than that.

"**Senator Anderson.** Second the motion.

"**Senator Cordon.** That takes care of its complete right in the coast line outside of the low water, and it saves the right it has in others, and I think it will completely answer your problem.

"Now, if there are no other amendments, the Chair will entertain a motion to favorably report the bill."

(*Id.* at 1424.)

The Committee on Interior and Insular Affairs then voted to report Senate Joint Resolution 13 favorably to the full Senate. (*Senate Hearings*, Pt. II, at 1424-25.) In the committee report which accompanied the resolution to the floor, there was but a single paragraph explaining the amendments to Section 5 made in committee. That paragraph stated:

"[61] The language that is substituted for that stricken in the original bill is generally similar in purpose, but spells out in greater detail the classes of land exempted from the operation of section 3 of the Joint Resolution. It is believed that, with this explanation, the language is otherwise self-explanatory. *However, the committee wishes to emphasize that the exceptions spelled out in this amendment do not in anywise include any claim resting solely upon the doctrine of 'paramount rights' enunciated by the Supreme Court with respect to the Federal Government's status in the areas beyond inland waters and mean low tide.*" S. Rep. No. 133, 83d Cong., 1st Sess. 20 (1953). (Emphasis added.)

In the Senate debates on Senate Joint Resolution 13 (which ultimately became the Submerged Lands Act), there are only two brief discussions of the claim of right exception. Senator Cordon of Oregon was the floor manager for the resolution as reported out of the Interior and Insular Affairs Committee. *See* 99 Cong. Rec. 2612-13 (1953). During his initial presentation of the resolution, Senator Cordon yielded to questions from Senator Holland of Florida. Referring to the language of the claim of right exception added in committee, Senator Holland expressed satisfaction with the explanation set out in the committee report. Then Senator Holland asked the following question which initiated an exchange of remarks:

> "Am I correct in understanding that under that particular provision the mere fact that the Supreme Court might have held that the United States has paramount rights in submerged lands beyond mean low water, and within State boundaries, would not in any way give the United States the right to claim exceptions of such lands from the joint resolution, in view of the fact that such lands would not be "presently and actually occupied by the United States"? Am I correct in that understanding?
>
> "**Mr. Cordon.** The Senator from Florida is correct in his understanding. I should like to add that the last language quoted, namely, "any rights the United States has in lands presently and actually occupied by the United States under claim of right," came into the bill at the request of the Department of Justice. It was presented to the committee and explained by the Department of Justice as being for the purpose of reserving to the Federal Government the area of any installation, or part of an installation – and I use the term "installation" to distinguish a specific area, used for a specific purpose, from any vast area that might be claimed under the paramount right doctrine – actually occupied by the Government under a claim of right. There must be a

right in the Government to it. The Government will have an opportunity, a day in court, to determine the correctness of its claim. There was no other purpose in the language.

> "**Mr. Holland.** I thank the distinguished Senator from Oregon. If he will permit me to ask another question, I should like to inquire if it was the purpose of this particular exception to leave the Federal Government exactly in the position it now occupies, with such rights as it may have, and with such obligations or responsibilities as it may have, with reference to any lands which it presently and actually occupies by reason of building and maintaining on such lands, installations and the like, under claim of right. There was no purpose to improve the rights of the United States, or to take from those rights in any particular, by this provision?
>
> "**Mr. Cordon.** The Senator is exactly correct."

99 Cong. Rec. 2619 (1953).

The second reference to the claim of right exception occurred when Senator Cordon read the complete text of Section 5 to the assembled Senators, and then added:

> "The provisions of this section were, I believe, discussed somewhat at length yesterday, so the Senator from Oregon will not again go over them unless there is some question with respect to any one of them specifically. The Senator from Oregon only wants to say with reference to the exceptions set forth in the section that they were to a great extent urged and recommended by the Department of Justice, and approved by it, as affording ample protection for properties of the United States which should not be affected by this joint resolution."

99 Cong. Rec. 2699 (1953).

There was no further mention of the claim of right exception in the Senate debates. The particular language of

exception, added in the Senate, was not discussed at all in the House debates which preceded final passage of the Submerged Lands Act in the House of Representatives. *See* 99 Cong. Rec. 4877-98 *passim*. There was no conference report since the House passed the Senate version of the bill without change.

In summary, the legislative history of the claim of right exception clearly shows that this language was added to preserve federal claims to submerged lands which would have otherwise been extinguished if this proviso had not been included. Thus, the claim of right exception was simply a savings clause. As such, it did not validate any federal claims to lands seaward of the line of mean lower low water. It just kept those claims alive until they could be adjudicated or otherwise resolved. This point was made best by Senator Holland in the Senate debates when he queried that "There was no purpose to improve the rights of the United States, or to take from those rights in any particular, by this provision?", and Senator Cordon answered: "The Senator is exactly correct." 99 Cong. Rec. 2619 (1953).

The Senate Report, however, specifically eliminates one species of claim from those preserved by the proviso excepting any rights the United States has in lands presently or actually occupied by the United States under claim of right." The report does not except "any claim resting solely upon the doctrine of 'paramount rights' enunciated by the Supreme Court with respect to the Federal Government's status in the areas beyond inland waters and mean low tide." S. Rep. No. 133, 83d Cong., 1st Sess. 20 (1953). As will be presently shown, the only claim the federal government has to submerged lands in the one-mile belt around Anacapa and Santa Barbara Islands is of this variety. This type of claim was not preserved for future adjudication; it was extinguished totally and completely.

C. The United States Does Not Possess a Claim of Rights of the Type Preserved by the Last Clause of Section 5(a)

The United States contends that any tidelands or submerged lands added to the Channel Islands National Monument are still owned by it by virtue of the Section 5 exception for "any rights the United States has in lands presently and actually occupied under claim of right." (U.S. Motion 13-15.) The memorandum for the United States focuses completely on "actual occupation" and completely ignores the need for a claim of right.

Perhaps California could have challenged the sufficiency of federal occupation of the "areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands." In the discussions which took place in the executive session of the Senate Interior and Insular Affairs Committee, it was the understanding of Senators Daniel and Cordon that the last clause of Section 5(a) referred to "parcels that are actually occupied and not to parcels of land over which there may be some theory of constructive occupancy, such as all of the unoccupied submerged lands below low tide which it is intended by this bill to actually restore to the States out to their historic boundaries." *Senate Hearings*, 1422-23. To obviate the need for a Special Master to resolve factual issues about the nature of federal occupation, if any, between 1949 and 1953, California joined the United States in stipulating for purposes of this request for a decree that the federal government "presently and actually occupied" the areas within the one-mile belt. The full text of this stipulation is set forth in the Joint Appendix. (Jt. App. 1.) California was willing to concede "actual occupation" because it should be obvious that the United States had no claim of right in 1953, and has none now, which gives it any right to assert federal ownership and jurisdiction over any tidelands, submerged lands, or water areas in the one-mile belt set aside for national monument purposes in 1949.

The United States apparently treats the claim of right exception as if it were a federal statute providing for acquisition of title by adverse possession or prescription. The response to California's petition seems to assume that "actual occupation" not only prevents a transfer to the States by operation of the Submerged Lands Act but also establishes undisputed federal title to the lands so occupied. (*See* U.S. Motion 13-15.) But the exception does not work that way.

There are two criteria which must be met for the exception to come into play. First, the federal government must have "presently and actually occupied" the lands in question as of the date the Submerged Lands Act became law in 1953. Secondly, the federal government must have had a "claim of right" to the lands in question on that date. Then and only then were any rights possessed by the United States excepted from the Submerged Lands Act. But the exception was not tantamount to a congressional declaration that the federal claim was a valid one or that the State no longer had an interest in the lands claimed. It merely saved existing claims from being extinguished – the Submerged Lands Act relinquished all right, title and interest of the federal government and might otherwise have transferred submerged lands owned by virtue of title unrelated to the "paramount rights" doctrine. (*Compare* California's interpretation *with* Senator Cordon's remarks at the executive session, *Senate Hearings*, Pt. II, at 1396.) To use Senator Holland's phraseology, "There was no purpose to improve the rights of the United States, or to take from those rights in any particular, by this provision." 99 Cong. Rec. 2619 (1953). Attorney General Brownell told the Senate Committee that the true purpose of the language he proposed was "to preserve the rights of the Federal Government that they legally possess." *Senate Hearings* at 948. Any federal claim preserved by the claim of right exception was to be left in precisely the same condition it would have had if the Submerged Lands Act had never passed. As Senator Cordon put the matter,

> "It leaves the question of whether it is a good claim or a bad claim exactly where it was before. This is simply an exception by the United States of a voluntary release of its claim, whatever it is. It does not, in anywise, validate the claim or prejudice it." *Senate Hearings*, Pt. II, at 1321.

What then is the nature of the federal "claim of right" as regards the areas surrounding Anacapa and Santa Barbara Islands? The 1949 proclamation, enlarging the Channel Islands National Monument in and of itself, is not a claim of right. This Presidential act was a reservation of "lands owned or controlled by the Government of the United States" pursuant to Section 2 of the Antiquities Act of 1906, 16 U.S.C. § 431. The claim of right is source of federal title to these lands prior to their reservation for national monument purposes. The federal government must claim these lands because it owns or controls them, not just because it reserved them. If this were not so, the federal government could reserve any property owned by another and have a claim of right.

On what basis can the federal government claim that it "owned or controlled" any lands within the one-mile belt prior to their reservation for national monument purposes? With respect to the tidelands, the United States had no claim whatsoever in 1949 because California has always owned them. This was demonstrated at length in the first section of this brief. Even the 1947 decision which established the "paramount rights" doctrine reconfirmed the principle settled in a long line of prior cases that California owned its "tidelands down to the low water mark." *United States v. California*, 332 U.S. 19, 30 (1947). The 1966 supplemental decree further emphasized the point when it adjudged California to have "the title to and ownership of the tidelands along its coast (*defined as the shore* of the mainland and *of islands*, between the line of mean high water and the line of mean low water) . . . ." *United States v. California*, 382 U.S. 448, 452 (1966.) (Emphasis added.)

When subjected to critical scrutiny, the claim to the submerged lands of the one-mile belt also evaporates. *But for* the 1947 decision in this case, the federal government would have had no rights to the submerged lands between the line of mean lower low water on the coast and the current federal-state boundary line three nautical miles seaward. The 1947 decree stated that the United States was possessed of "paramount rights in and full dominion and power over, the lands, minerals and other things" underlying the Pacific Ocean seaward of the ordinary low-water mark on the coast of California to a distance of three nautical miles. *United States v. California*, 332 U.S. 804, 805 (1947). Prior to this decision, the federal government had never had an adjudication in its favor respecting the submerged lands of the three-mile marginal belt. Only by virtue of the "paramount rights" doctrine has the federal government had any claim before or since to these lands.

Yet the 1947 "paramount rights" decision did not establish that the United States "owned" the submerged lands underlying the territorial sea off the California coast. The Court carefully abstained from recognizing such a claim of ownership by the Untied States, striking out the proprietary claim of the United States from the terms of the decree proposed by the United States in 1947. *See United States v. Texas*, 339 U.S. 707, 724 (1950) (Frankfurter, J., dissenting). Thus, the submerged lands of the one-mile belt were not "owned" by the federal government in 1949 when they were supposedly reserved for national monument purposes. They may not even have been "controlled" by the United States if that language in the Antiquities Act is read in light of its orignal intent to cover military reservations, Indian lands, and national forest lands. *See* R. Lee, *op. cit. supra* at 53.

Be that as it may, it is indisputable that any and all federal rights to submerged lands added to the Channel Islands National Monument in 1949 had their source in the "paramount rights" doctrine enunciated by the Court in 1947. But for that doctrine, the federal government could point to no

source of rights whatsoever. It is equally incontestable that the Senate Report expressly excluded any claim based on the "paramount rights" doctrine from the coverage of the claim of right exception enacted in Section 5 of the Submerged Lands Act. To reiterate the committee's language, " . . . the committee wishes to emphasize that the exceptions spelled out in this amendment do not in anywise include any claim resting solely upon the doctrine of 'paramount rights' enunciated by the Supreme Court with respect to the Federal Government's status in the areas beyond inland waters and mean low tide." S. Rep. No. 133, 83d Cong., 1st Sess. 20 (1953). This same point was made at the executive session of the Interior and Insular Affairs Committee (*Senate Hearings*, Pt. II, at 1322) and again on the Senate floor (99 Cong. Rec. 2619). Since there was an express legislative intent to exclude this type of claim from the class of federal claims sought to be preserved, it follows that no federal rights in the submerged lands underlying the one-mile belt survived the enactment of the Submerged Lands Act. No federal rights having been preserved by the claim of right exception, the Act effectively reconfirmed California's ownership of the lands in question. It follows by inexorable logic that a claim founded on the "paramount rights" doctrine alone could not survive the passage of the Submerged Lands Act. If such a claim were preserved, the United States would have a claim of right to the entire three-mile belt which the Act was designed to relinquish to the States. Senator Long made this point at the executive session (*Senate Hearings* at 1322), and it obviously carried over into the explanation which appeared in the Senate Report.

This leaves the water areas themselves. If jurisdiction over the waters of the Pacific Ocean within one mile of the shoreline of Anacapa and Santa Barbara Islands were all that was added to the national monument by the 1949 enlargement, were the federal rights in those water areas preserved by the claim of right exception? The answer has to be, No. The claim of right exception only preserved rights in land,

not water. The precise language of the exception is "and any rights the United States has in *lands* presently and actually occupied by the United States under claim of right." Section 5, 67 Stat. 32, 43 U.S.C. § 1313. (Emphasis added.)

D. The Submerged Lands Act Revoked the 1949 Proclamation Reserving the One-Mile Belt for National Monument Purposes

Since the 1949 proclamation did not constitute a claim of right, one must inquire if the areas added to the Channel Islands National Monument by that proclamation were excepted from the operation of the Submerged Lands Act for yet another reason. It is a settled rule that lands reserved for a public purpose are to be regarded as impliedly excepted from subsequent laws, grants and disposals unless the subsequent act discloses a specific intent to include them. *United States v. Minnesota*, 270 U.S. 181, 206 (1926), and cases cited. Every act of Congress making a grant or otherwise disposing of federal land must be treated as both a law and a grant, and the intent of Congress, when ascertained, is to control in the interpretation of the law. *Wisconsin Cent. R.R. Co. v. Forsythe*, 159 U.S. 46, 55 (1895).

Here the lands reserved by the 1949 proclamation were reserved for a public purpose, but the Submerged Lands Act discloses a clear legislative intent to include them in the scope of its disposal in favor of coastal States. The language of the Act itself expresses this intent. It finds it to be in the public interest to return all "lands beneath navigable waters" to the States. Sections 2 and 3(a), 67 Stat. 29-30, 43 U.S.C. §§ 1301, 1311(a). In the Act, the United States releases and relinquishes to the States all right, title, and interest it has in or to all lands, improvements and natural resources covered by the Act. Section 3(b), 67 Stat. 30, 43 U.S.C. § 1311(b). This Court has construed the Act on two occasions at least effectively to confirm or grant to the States *all* submerged lands within three miles of their coastlines. *United States v. Alaska*, *supra*, 422 U.S. at 185; *United States v. California*, *supra*,

381 U.S. at 148. As explained by Senator Holland, who introduced Senate Joint Resolution 13, the object of the bill was to restore "to the States their plenary rights, property, jurisdiction and control which they exercised for 150 years over the areas lying within State boundaries." *Senate Hearings* 49. On the Senate floor, Senator Cordon explained that the purpose of the release and relinquishment of all federal right, title and interest was "to make the States whole and put them in the position in which they would have been in the absence of any of the three decisions [invoking the paramount rights doctrine]." 99 Cong. Rec. 2693 (1953). The legislative history of the Submerged Lands Act is replete with other statements to the same effect. Mr. Justice Black has noted that, in the reported deliberations on that bill, the term "historic state boundaries" was used 813 times, "original boundaries" 121 times, and "traditional" boundaries 114 times. *United States v. California*, *supra*, 381 U.S. at 188 (Black, J., dissenting). This wealth of legislative material demonstrating an intent to dispose of all federal lands held by virtue of the paramount rights doctrine and to restore the States to their pre-1947 positions also shows an intent to include all tidelands, submerged lands, and waters areas reserved by the 1949 proclamation in the scope of the statute subsequently enacted in 1953.

It also refutes the claim of the United States that by expressly revoking Executive Order No. 10426, setting aside the submerged lands of the Continental Shelf as a naval petroleum reserve, Congress somehow manifested a corresponding intent not to revoke any other reservations. (*See* U.S. Motion 15 *and* Section 10, 67 Stat. 33.) This suggestion merely invokes the canon of statutory construction, *expressio unius est exclusio alterius*. As one recent treatise has observed,

> "Several Latin maxims masquerade as rules of interpretation while doing nothing more than describing results reached by other means. The best

example is probably *expressio unius est exclusio alterius*, which is a rather elaborate, mysterious sounding, and anachronistic way of describing the negative implication. Far from being a rule, it is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes it does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore, there is not even a mild presumption here. Accordingly, this maxim is at best a description, after the fact, of what the court has discovered from context."

R. Dickerson, *The Interpretation and Application of Statutes* 234-35 (1975). (Footnotes omitted.)

In other words, sometimes the expression of one thing excludes something else, and other times it does not. The overwhelming evidence contained in the language of the Submerged Lands Act and its legislative history indicates an undeniable intent to revoke the 1949 reservation for national monument purpose. Otherwise California could not be returned to its pre-1947 position. Here *expressio unius non est exclusio alterius* despite the express revocation of Executive Order No. 10456.

III

THE THREE NAUTICAL MILE BOUNDARY BETWEEN STATE AND FEDERAL SUBMERGED LANDS IS MEASURED FROM THE COASTLINE OF NOT ONLY ANACAPA AND SANTA BARBARA ISLANDS BUT ALSO THE OTHER ISLETS AND ROCKS WITHIN THE ONE-MILE BELT

The 1966 supplemental decree of this Court defines "coastline" in part as "the line of mean lower low water on the mainland, on islands, and on low-tide elevations lying wholly or partly within three geographical miles from the line of mean lower low water on the mainland or on an island . . . ." *United States v. California*, 382 U.S. 448. 449 (1966) (para. 2). The supplemental decree proposed by the United States would measure the three-mile boundary only from the coastlines of Anacapa and Santa Barbara Islands. (U.S. Motion, 4-5, para. 3.) California seeks a decree which specifies that the relevant coastline includes the coastline not only of these two islands but also of every other island and low-tide elevation within three geographical miles of the coastline of Anacapa and Santa Barbara Islands.

California admits that the 1966 supplemental decree requires the use of these additional geographic features as base points for measuring the breadth of the three-mile belt. The 1966 decree defined an island to include any "naturally-formed area of land surrounded by water, which is above the level of mean high water." (382 U.S. at 449, para. 3.) This definition would include all of the islets and rocks added to the Channel Islands National Monument in 1949.

The 1966 decree also defined a low-tide elevation as any "naturally-formed area of land surrounded by water at mean lower low water, which is above the level of mean lower low water but not above the level of mean high water." (382 U.S. at 450.) All low-tide elevations lying wholly or partly within

three geographical miles from the line of mean lower low water on an island are part of the "coast line" defined in the 1966 decree. (*Id.* at 449.) Under this rule, any low-tide elevations within three miles of Anacapa and Santa Barbara Islands constitute part of the coastline for purposes of measuring the three mile territorial boundary between state and federal submerged lands.

If the decree proposed by the United States were adopted, it would only use the coastline of Anacapa and Santa Barbara Islands for purposes of measuring the three-mile boundary. On the other hand, California's proposed supplemental decree properly reflects the influence of the offshore rocks located within three geographical miles from the coastlines of Anacapa and Santa Barbara Islands. California's proposed language on this point reads as follows:

> "1. As against the United States, the State of California has title to and is the owner of all tidelands, submerged lands and natural resources (as defined in subsection (e) of 43 U.S.C. § 1301) between the mean high water line and the furthest extent of the territorial sea surrounding all islands *and low-tide elevations* located within the Channel Islands National Monument, established by Presidential Proclamation No. 2281, 52 Stat. 1541 (April 26, 1938) and extended by Presidential Proclamation No. 2825, 63 Stat. 1258 (February 9, 1949), *and any additional low-tide elevations located within three geographical miles from any of the islands of the monument.*
>
> "With respect to the foregoing land and natural resources, California's rights include the right and power to manage, administer, lease, develop and use these lands and natural resources all in accordance with applicable State law."

With the foregoing italicized corrections, California submits that its proposed supplemental decree correctly

reflects the coastline for purposes of identifying the boundary line between the submerged lands of the United States and the submerged lands of the State of California. For this reason, the above language should be adopted in preference to that set forth in paragraph 3 of the supplemental decree proposed by the United States.

CONCLUSION

Based on the foregoing argument, California urges this Court to enter a third supplemental decree in the form proposed in its petition with the slight modifications set forth in Section III of this brief.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

Federal

The Antiquities Act of 1906

Section 2 of this Act, 34 Stat. 225, 16 U.S.C. § 431, provides:

> "The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States."

The Submerged Lands Act of 1953

Section 2 of this Act, 67 Stat. 29, 43 U.S.C. § 1301, provides in relevant part:

"When used in this Act–

"(a) The term 'lands beneath navigable waters' means–

"...

"(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at

the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles . . . ;

" . . .

"(c) The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

" . . .

"(e) The term 'natural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power . . . ."

Section 3 of this Act, 67 Stat. 30, 43 U.S.C. § 1311, provides in relevant part:

"(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

"(b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all

said lands, improvements, and natural resources . . . ."

Section 5 of this Act, 67 Stat. 32, 43 U.S.C. § 1313, provides:

"There is excepted from the operation of section 3 of this Act–

"(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

"(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

"(c) all structures and improvements constructed by the United States in the exercise of its navigational servitude."

Section 6 of this Act, 67 Stat. 32, 43 U.S.C. § 1314, provides:

"(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national

defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 3 of this Act.

"(b) In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of the said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor."

Section 8 of this Act, 67 Stat., 32, 43 U.S.C. § 1316, provides:

"Nothing contained in this Act shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this Act and such rights, if any, shall be governed by the law in effect at the time they may have been acquired: *Provided, however,* That nothing contained in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that the law under which such rights may be claimed in fact or in law applies to the lands subject to this Act, or authorizes or compels the granting of such rights in such lands, and that the determination of the applicability or effect of such law shall be unaffected by anything contained in this Act."

Section 10 of this Act, 67 Stat. 32-33, 18 Fed. Reg. 405, provides:

"Executive Order Numbered 10426, dated January 16, 1953, entitled 'Setting Aside Submerged Lands of the Continental Shelf as a Naval Petroleum Reserve', is hereby revoked insofar as it applies to any lands beneath navigable waters as defined in section 2 hereof."

State

The following Florida statutes authorized the deed of cession by which the United States acquired the Dry Tortugas Islands, which were later placed in Fort Jefferson National Monument:

Florida Statutes, 1845

CHAP. 24. [No. xxiv.] An ACT assenting to the purchase, by the United States of certain land on the Island of Key West, for the purpose of erecting fortifications thereon, and ceding to the United States jurisdiction over said land for the purpose aforesaid.

WHEREAS, in pursuance of the authority of an Act of Congress, approved June 17, 1844, the Executive of the United States have entered into negotiations for the purchase of a tract of land consisting of several parcels, situated on the Island of Key West in Monroe county, between Light House Point and the City of Key West, for the purpose of erecting and constructing on said land certain fortifications and the improvements therewith connected, as contemplated by said Act; and it is requisite and proper that the assent of the State of Florida to said purchase shall be given, and the cession to the United States of jurisdiction over said land shall be made, for the purposes aforesaid.

SECTION 1. *Be it therefore enacted by the Senate and House of Representatives of the State of Florida, in General Assembly convened,* That the United States be, and they are hereby authorized and empowered to purchase, hold, occupy and possess the tract of land in the preamble above referred to, as the same, or the extent and limits thereof shall be ascertained, described and conveyed in the instrument, or instruments, which shall be executed for the conveyance of the same in pursuance of said negotiations. And the United States may and shall have and exercise exclusive jurisdiction over said

tract of land within the extent and limits to be ascertained and described as aforesaid, as well as over any land or site that may be formed or constructed in the contiguous sea, and used and occupied by the United States for said purposes in connection with the tract above mentioned, so long as they shall deem it proper to hold and occupy the same for the porposes [sic] aforesaid: Provided, that nothing herein contained shall be so construed as to prevent or debar the proper officers of the State of Florida from executing any process, civil or criminal, within the limits and extent of said land or lands when ascertained, described, and occupied as aforesaid.

[Passed the Senate. Passed the House of Representatives. – Approved by the Governor. July 8th, 1845.]

CHAP. 25. [No. xxv.] An ACT supplementary to, and extending the provisions of an act assenting to the purchase by the United States, and ceding to the same jurisdiction of certain lands on the Island of Key West, for the purposes designated in said act, Approved July 8th, 1845.

WHEREAS, a communication has been received from the Executive Department of the U.S. since the approval of the above recited act, requesting of this present Gen'l Assembly the passage of a law enlarging the provisions of said act so as to facilitate the purchases contemplated thereby, and extending said provisions thus enlarged, to all cases in which the United States shall deem it expedient, and shall seek to purchase, and obtain jurisdiction over sites for forts, magazines &c., within the limits of this State, as authorized and provided in the Constitution of the United States; and whereas this General Assembly approve the purport and objects of said request as set forth in said communication;

SECTION 1. *Be it therefore enacted by the Senate and House of Representatives of the State of Florida in General Assembly convened,* That the United States be, and they are hereby authorized and empowered to purchase, acquire, hold, own, occupy and possess such land or lands within the limits of this State as they shall adjudge it expedient, and shall seek to occupy and hold as sites on which to erect and maintain forts, magazines, arsenals, dockyards, and other needful buildings, or any of them, as contemplated and provided in the Constitution of the United States, said purchases to be effected either by contract with the owner or owners of said land or lands, or in the manner hereinafter provided.

§ 2. *Be it further enacted,* That if the executive officer or other authorized agent, employed by the U.S. to make said purchase or purchases, and the owner or owners of the land or lands mentioned in said above recited act, or of any other land or lands contemplated to be purchased as aforesaid, cannot contract, or agree for the sale and purchase thereof, it shall be lawful for such officer, or other agent to apply to the Judge of the Circuit Court of the County in which said land or lands, or the greater portion thereof, may be situated, respectively, to estimate the value of such land or lands in manner hereinafter mentioned, and to order a conveyance of the same to the United States for the purposes aforesaid: Whereupon it shall be the duty of said Judge, and he is hereby authorized and empowered, after reasonable notice given to said owner or owners, their legal representatives or guardians, to hear and finally determine the value of the land or lands in question by a competent jury under oath, to be summoned by the Sheriff or other proper officer of said Court for that purpose, or by a Committee of three persons, such as shall be agreed upon and appointed by the parties aforesaid, such Committee if agreed on, and appointed as

aforesaid, to be also duly sworn faithfully and impartialy [sic] to value the land or lands last aforesaid; and the value thereof being thus ascertained to the satisfaction of said Judge, after survey thereof duly made under the direction of himself, or by consent of said parties, and after such other proceedings in the premises as he shall deem right and proper, he shall order and decree the same to be conveyed in due form to the United States, to be held, owned, and possessed by them for the purposes aforesaid, and none other: *Provided*, that the amount of such valuation, with the reasonable costs of such owner or owners attending said proceedings, shall be paid to him, her or them, or into said Court for his, her or their use, before execution or record of said conveyance: *And provided, moreover*, that if it shall appear to said Judge, upon objection made by said owner or owners, their representatives or guardians, that the quantity of any given tract, parcel or extent of land sought to be purchased as aforesaid, is greater than is reasonable, he may in his discretion refer the matter of such objection to the Governor of this state for his determination.

§ 3. *Be it further enacted*, That whenever the United States shall contract for, purchase or acquire any land or lands within the limits of this State for the purposes aforesaid, in either of the modes above mentioned and provided, and shall desire to acquire constitutional jurisdiction over such land or lands for said purposes, it shall and may be lawful for the Governor of this State, upon application made to him in writing, on behalf of the United States, for that purpose, accompanied by the proper evidence of said purchase, contract or acquisition of record, describing the land or lands sought to be ceded by convenient metes and bounds, and the said Governor shall be, and he is hereby authorized and empowered, thereupon, in the name and on behalf of this State, to cede to the United States exclusive juris-

diction over the land or lands so purchased or acquired and sought to be ceded; the United States to hold, use, occupy, own, possess, and exercise said jurisdiction over the same for the purposes aforesaid, and none other whatsoever: *Provided always*, that the consent aforesaid is hereby given, and the cession aforesaid is to be granted and made as aforesaid, upon the express condition that this State shall retain a concurrent jurisdiction with the United States in and over the land or lands so to be ceded, and every portion thereof so far that all process civil or criminal, issuing under the authority of this State, or of any of the Courts, or judicial officers thereof, may be executed by the proper officers thereof, upon any person or persons amenable to the same, within the limits and extent of the land or lands so ceded, in like manner and to like effect, as if this act had never been passed; saving, however, to the United States security to their property within said limits and extent, an exemption of the same, and of said land or lands, from any taxation under the authority of this State, whilst the same shall continue to be owned, held[,] used and occupied by the United States for the purposes above expressed and intended, and not otherwise.

[Passed the Senate July 17th, 1845. Passed the House of Representatives July 21st, 1845. Approved by the Governor July 24th, 1845.]

ADDITIONAL PROCLAMATIONS AND EXECUTIVE ORDERS INVOLVED

Proclamation No. 2667, 59 Stat. 884, 3 C.F.R., 1943-48 Comp., 67-68

POLICY OF THE UNITED STATES WITH RESPECT TO THE NATURAL RESOURCES OF THE SUB-SOIL AND SEA BED OF THE CONTINENTAL SHELF

WHEREAS the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and

WHEREAS its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable or will become so at an early date; and

WHEREAS recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and

WHEREAS it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources;

NOW, THEREFORE, I, HARRY S TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this 28th day of September, in the year of our Lord nineteen hundred and forty-five, and of the Independence of the United States of America the one hundred and seventieth.

[SEAL]

HARRY S TRUMAN

By the President:
DEAN ACHESON,
Acting Secretary of State.

Executive Order

No. 779

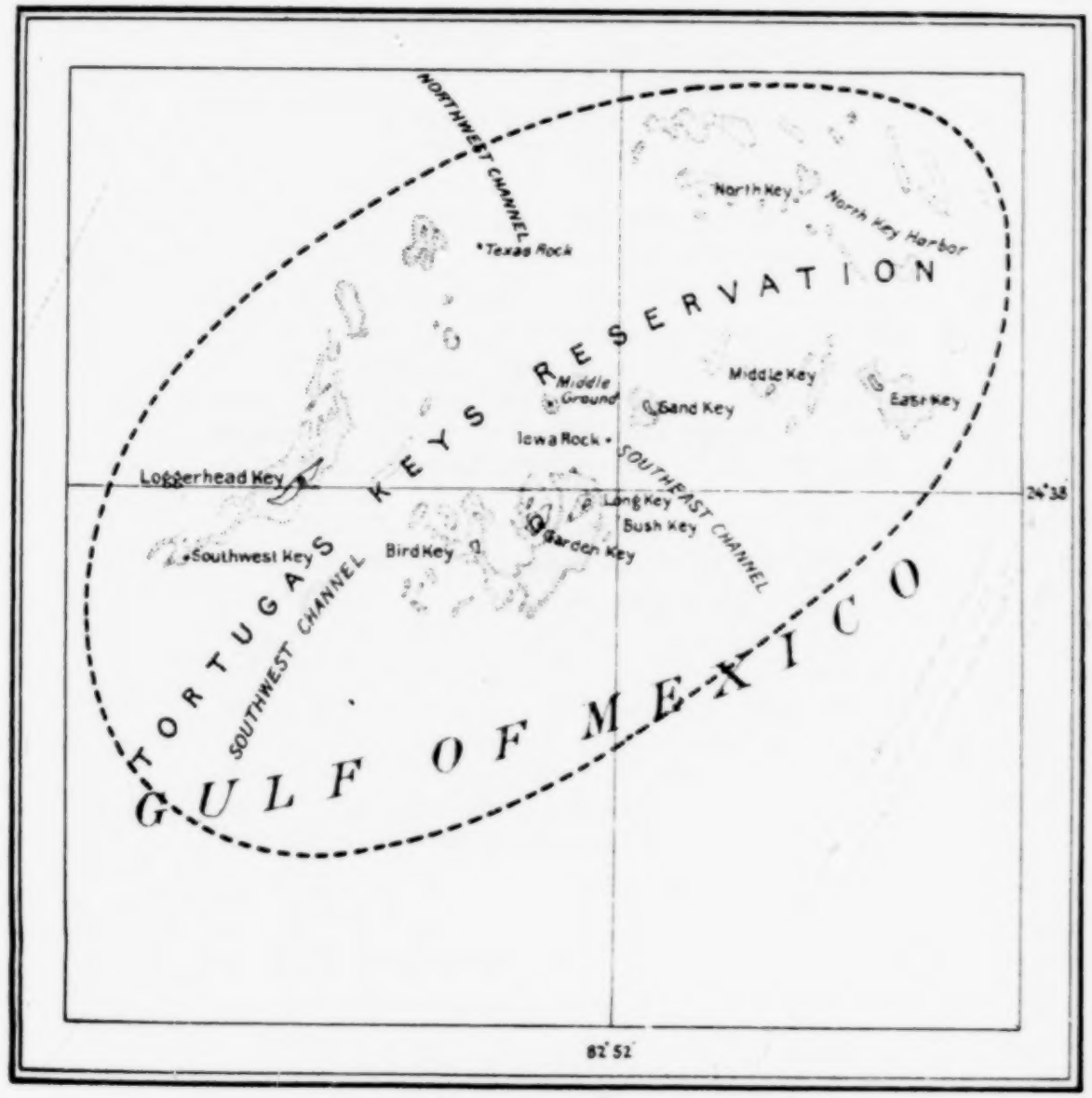
It is hereby ordered that all islands embraced within the group known as the Dry Tortugas, located in the Gulf of Mexico near the western extremity of the Florida Keys, approximately in latitude twenty-four degrees thirty-eight minutes north, longitude eighty-two degrees fifty-two minutes west from Greenwich, and situated within the area segregated by a broken line upon the diagram hereto attached and made a part of this order, are hereby reserved and set aside for the use of the Department of Agriculture as a preserve and breeding ground for native birds; but the reservation made by this order is not intended to interfere with the use of these islands for necessary military purposes under the Executive Order of September 17, 1845, creating the Dry Tortugas Military Reservation, nor to in any manner vacate such order, except that such military use shall not extend to the occupation of the islet known as Bird Key. This reservation to be known as Tortugas Keys Reservation.

THEODORE ROOSEVELT

THE WHITE HOUSE,
April 6, 1908.

TORTUGAS KEYS RESERVATION
For Protection of Native Birds
FLORIDA

Embracing all islands of the Dry Tortugas Group, Florida segregated by the broken line and designated "Tortugas Keys Reservation"



DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Fred Dennett, Commissioner.

Executive Order
No. 1613

It is hereby ordered that the following named harbors, viz:

Tortugas, Florida;
Great Harbor, Culebra;
Guantanamo Naval Station, Cuba;
Pearl Harbor, Hawaii;
Guam;
Subig Bay, Philippine Islands;
Kiska, Aleutian Islands;

are not, and that they shall not be made, sub-ports of entry for foreign vessels of commerce, and that said harbors shall not be visited by any commercial or privately owned vessel of foreign registry, nor by any foreign national vessel, except by special authority of the United States Navy Department in each case.

THE WHITE HOUSE,
September 23, 1912.

Wm H TAFT

Executive Order
No. 5281

To Establish Air-Space Reservations over Certain Harbors as Prohibited Areas for Civil Aircraft

Pursuant to the authority contained in section 4 of the Air Commerce Act of 1926, approved May 20, 1926 (44 Stat. 568; title 49, sec. 174, Supp. III, U.S. Code), the air space over each of the hereinafter named harbors that are declared closed ports by Executive Order No. 1613, dated September 23, 1912, is hereby designated, reserved, and set aside for governmental purposes as a prohibited area within which civil aircraft are not authorized to be navigated:

Tortugas, Florida;
Great Harbor, Culebra;
Guantanamo Naval Station, Cuba;
Pearl Harbor, Hawaii;
Guam;
Subic Bay, Philippine Islands;
Kiska, Aleutian Islands.

At no time shall civil aircraft of any kind be navigated within the air-space reservations above defined except by special authority of the United States Navy Department in each case. Navigation of aircraft within such air-space reservations otherwise than in conformity with this order shall be subject to the penalties provided by section 11 of the said Air Commerce Act of 1926.

HERBERT HOOVER

THE WHITE HOUSE
February 17, 1930.

Executive Order

No. 5318

Aleutian Islands Reservation Enlarged
Alaska

It is hereby ordered that Amak Island, the Sealion Rocks, and a small unnamed island lying southeast of Amak Island, all being situated north of the Alaska Peninsula in Bering Sea and lying approximately in latitude 55° 25' N., longitude 163° 10' W., within the boundary indicated by the broken line upon the diagram hereto attached and made a part of this order, and as shown on United States Coast and Geodetic Survey Chart No. 8802, published in Washington, D.C., March, 1928, be, and the same are hereby, reserved and set apart for the use of the Department of Agriculture as a refuge and breeding ground for birds and wild animals, subject to existing valid rights.

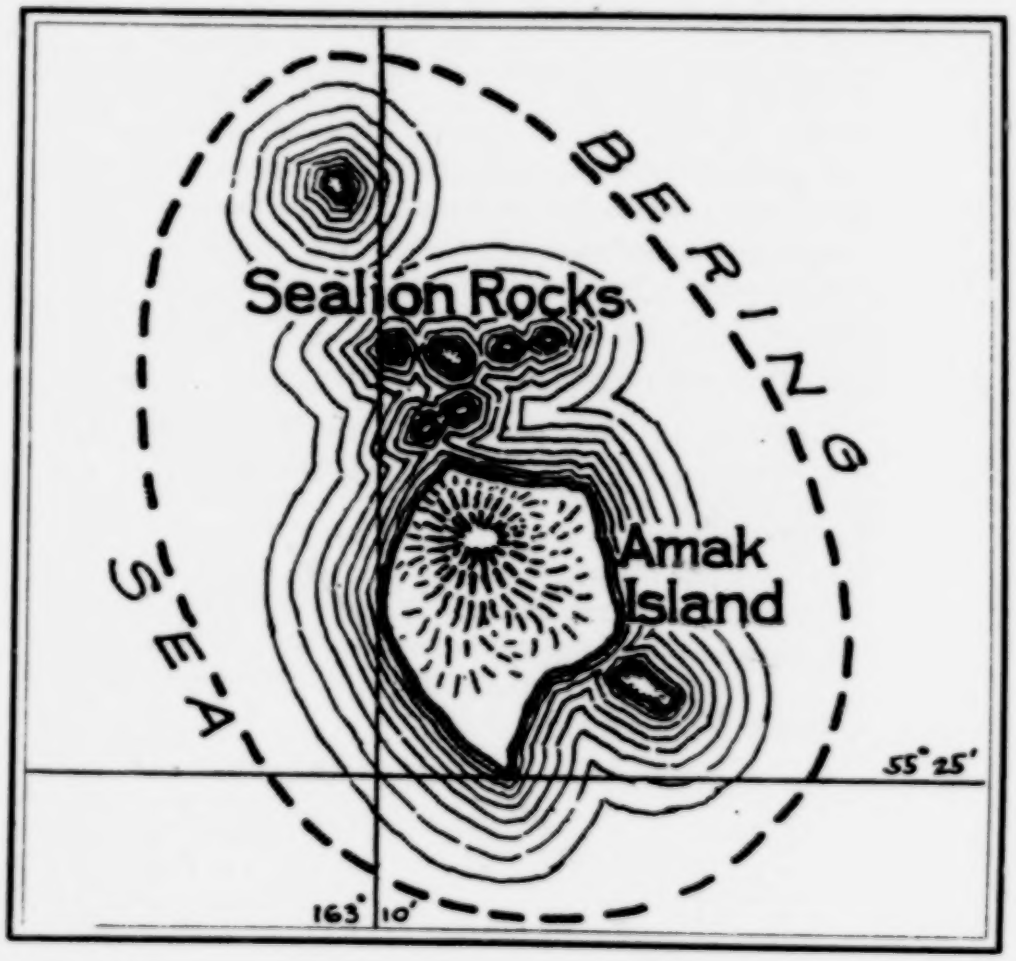
These islands and rocks are hereby added to and made part of the Aleutian Islands Reservation, Alaska, and shall be subject to all provisions of law, regulations, and orders governing said reservation.

HERBERT HOOVER

THE WHITE HOUSE,
April 7, 1930.

EXECUTIVE ORDER
ALEUTIAN ISLANDS RESERVATION ENLARGED
For Protection of Native Birds, the Propagation of Reindeer and Fur Bearing Animals and the Development of Fisheries.
ALASKA

Embracing Amak Island, the Sealion Rocks, and a small unnamed island lying southeast of Amak Island, as segregated by broken line and designated Aleutian Islands Reservation Enlarged



DEPARTMENT OF THE INTERIOR
RAY LYMAN WILBUR. SECRETARY
GENERAL LAND OFFICE
C.C. MOORE, COMMISSIONER

Executive Order

No. 5326

Withdrawal of Islands, Rocks, and Pinnacles
California

Under authority of the act of Congress approved June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), it is hereby ordered that all unreserved islands, rocks, and pinnacles situated in the Pacific Ocean off the coast of California be, and the same are hereby, temporarily withdrawn from settlement, location, sale, or entry, subject to the conditions and limitations of said acts, for classification and in aid of legislation, and subject to valid, existing rights.

This order shall continue in full force and effect unless and until revoked by the President or by act of Congress.

HERBERT HOOVER

THE WHITE HOUSE,
April 14, 1930.

Executive Order

No. 9633

3 C.F.R., 1943-48 Comp., 437

RESERVING AND PLACING CERTAIN RESOURCES OF THE CONTINENTAL SHELF UNDER THE CONTROL AND JURISDICTION OF THE SECRETARY OF THE INTERIOR

By virtue of and pursuant to the authority vested in me as President of the United States, it is ordered that the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States declared this day by proclamation to appertain to the United States and to be subject to its jurisdiction and control, be and they are hereby reserved, set aside, and placed under the jurisdiction and control of the Secretary of the Interior for administrative purposes, pending the enactment of legislation in regard thereto. Neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit.

HARRY S TRUMAN

THE WHITE HOUSE,
September 28, 1945.

Executive Order

No. 10426

3 C.F.R. 1949-53 Comp., 925-26

SETTING ASIDE SUBMERGED LANDS OF THE CONTINENTAL SHELF AS A NAVAL PETROLEUM RESERVE

By virtue of the authority vested in me as President of the United States, it is ordered as follows:

SECTION 1. (a) Subject to valid existing rights, if any, and to the provisions of this order, the lands of the continental shelf of the United States and Alaska lying seaward of the line of mean low tide and outside the inland waters and extending to the furthermost limits of the paramount rights, full dominion, and power of the United States over lands of the continental shelf are hereby set aside as a naval petroleum reserve and shall be administered by the Secretary of the Navy.

(b) The reservation established by this section shall be for oil and gas only, and shall not interfere with the use of the lands or waters within the reserved area for any lawful purpose not inconsistent with the reservation.

SEC. 2. The provisions of this order shall not affect the operating stipulation which was entered into on July 26, 1947, by the Attorney General of the United States and the Attorney General of California in the case of *United States of America v. State of California* (in the Supreme Court of the United States, October Term, 1947, No. 12, Original), as thereafter extended and modified.

SEC. 3. (a) The functions of the Secretary of the Interior under Parts II and III of

the notice issued by the Secretary of the Interior on December 11, 1950, and entitled "Oil and Gas Operations in the Submerged Coastal Lands of the Gulf of Mexico" (15 F.R. 8835), as supplemented and amended, are transferred to the Secretary of the Navy; and the term "Secretary of the Navy" shall be substituted for the term "Secretary of the Interior" wherever the latter term occurs in the said Parts II and III.

(b) Paragraph (c) of Part III of the aforesaid notice dated December 11, 1950, as amended, is amended to read as follows:

"(c) The remittance shall be deposited in a suspense account within the Treasury of the United States, subject to the control of the Secretary of the Navy, the proceeds to be expended in such manner as may hereafter be directed by an act of Congress or, in the absence of such direction, refunded (which may include a refund of the money for reasons other than those hereinafter set forth) or deposited into the general fund of the Treasury, as the Secretary of the Navy may deem to be proper."

(c) The provisions of Parts II and III of the aforesaid notice dated December 11, 1950, as supplemented and amended, including the amendments made by this order, shall continue in effect until changed by the Secretary of the Navy.

SEC. 4. Executive Order No. 9633 of September 28, 1945, entitled "Reserving and Placing Certain Resources of the Continental

Shelf under the Control and Jurisdiction of the Secretary of the Interior" (10 F.R. 12305), is hereby revoked.

HARRY S TRUMAN

THE WHITE HOUSE,
January 16, 1953.

No. 5, Original

Supreme Court U. S.
FILED
SEP 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA.

Joint Appendix for
Proposed Third Supplemental Decree.

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No. 5, Original

IN THE

Supreme Court of the United States

October Term, 1977

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA.

Joint Appendix for
Proposed Third Supplemental Decree.

Stipulations.

The following stipulations have been reached and agreed upon by the parties through their respective counsel:

1. If the phrase "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" referred to in Presidential Proclamation No. 2825, 63 Stat. 1258 (1949) includes the submerged lands and waters within the one-mile belt, then it is stipulated that the United States "presently and actually occupied" the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands for purposes of Section 5 of the Submerged Lands Act of 1953, 43 U.S.C. § 1313. This stipulation is intended only to eliminate any dispute as to the United States having "presently and actually occupied" the areas in question. The stipulation is not intended to resolve any other legal questions arising under the Submerged Lands Act of 1953 and its application to this case.

2. It is stipulated that the documents set forth in this appendix are genuine and may be received in evidence for all purposes relevant to this proceeding for entry of a third supplemental decree in *United States v. California*, No. 5, Original.

3. It is stipulated that the acreage figures shown on the diagram accompanying Presidential Proclamation No. 2825 are figures which approximate the total surface area of Anacapa and Santa Barbara Islands and one nautical mile of waters surrounding those islands. This stipulation is not intended to foreclose any legal argument by either party as to the significance of this fact in interpreting the 1949 Presidential Proclamation.

4. Each document which bears an addressee was in fact sent to the addressee in the ordinary course of business by the signator of the document.

DOCUMENT 1

FORT JEFFERSON NATIONAL MONUMENT—FLORIDA

January 4, 1935

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Fort Jefferson National Monument, Fla. Preamble.

WHEREAS it appears that the public interest would be promoted by revoking Executive Order No. 779, of April 6, 1908, creating the Dry Tortugas Keys Reservation; and by revoking (1) the Executive order of September 17, 1845, creating the Dry Tortugas Military Reservation, insofar as it relates to the Dry Tortugas group of islands, and (2) Executive Order No. 1613, of September 23, 1912, insofar as it closes the harbor of Tortugas, Florida, to navigation, and (3) Executive Order No. 5281, of February 17, 1930, insofar as it forbids air navigation over the said harbor; and by including the Dry Tortugas group of islands within a national monument for the preservation of Fort Jefferson and the historic and educational interest contained in such area:

Revoking designated Executive orders relating to the Dry Tortugas group of islands.

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, do hereby revoke the aforesaid Executive Order No. 779, of April 6, 1908; and I do hereby revoke (1) the aforesaid Executive order of September 17, 1845, insofar as it relates to the Dry Tortugas group of islands, and (2) Executive Order No. 1613, of February 23, 1912, insofar as it closes the harbor of Tortugas, Florida, to navigation, and (3) Executive Order No. 5281, of February 17, 1930, insofar as it forbids air navigation over said harbor.

National monument set apart.
Vol. 34, p. 225.
U. S. C., p. 651.

And under and by virtue of the authority vested in me by section 2 of the act of June 8, 1906 (34 Stat. 225; U. S. C., title 16, sec. 431), I do proclaim that, subject to all existing rights and to the existing reservation for lighthouse purposes affecting a portion thereof, the area indicated on the diagram hereto attached and forming a part hereof is hereby reserved from all forms of appropriation under the public-land laws and set apart as the Fort Jefferson National Monument.

Warning is hereby expressly given to all unauthorized persons not to appropriate, injure, destroy, deface, or remove any feature of this monument and not to locate or settle upon any of the lands reserved by this proclamation. Reserved from settlement.

The Director of the National Park Service, under the direction of the Secretary of the Interior, shall have the supervision, management, and control of this monument as provided in the act of Congress entitled "An Act to establish a National Park Service, and for other purposes", approved August 25, 1916 (ch. 408, 39 Stat. 535; U. S. C., title 16, secs. 1 and 2), and acts additional thereto or amendatory thereof. Supervision. Vol. 39, p. 535. U. S. C., p. 881.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

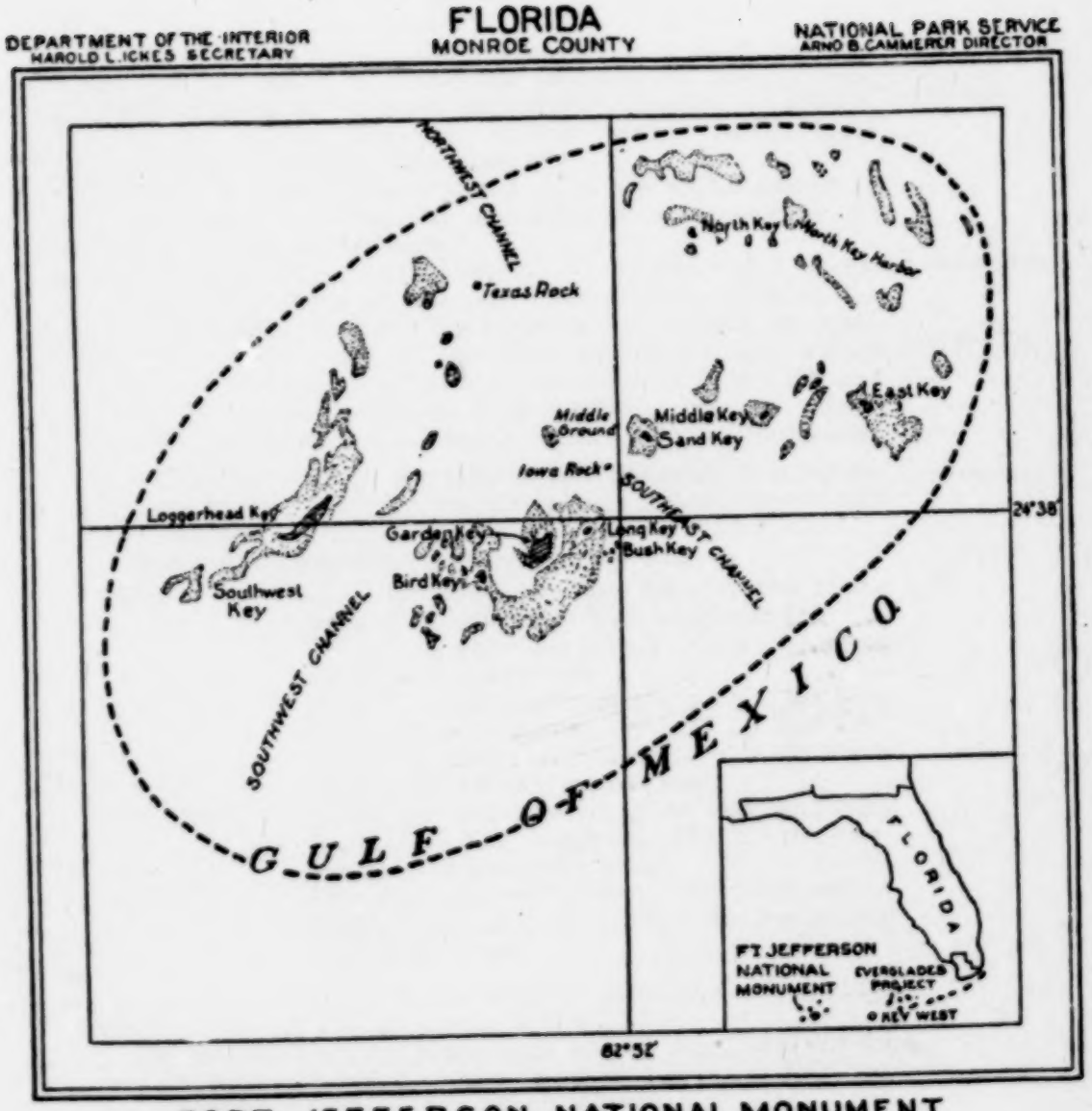
DONE at the city of Washington this fourth of January, in the year of our Lord nineteen hundred and thirty-five, and of the Independence of the United States of America the one hundred and fifty-ninth.

[SEAL]

FRANKLIN D ROOSEVELT

By the President:
CORDELL HULL
Secretary of State.

[No. 2112]



FORT JEFFERSON NATIONAL MONUMENT

3431—1

DOCUMENT 2

CHANNEL ISLANDS NATIONAL MONUMENT—CALIFORNIA

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

April 26, 1938
[No. 2281]

A PROCLAMATION

Channel Islands National Monument, Calif.
Preamble.

WHEREAS certain public islands lying off the coast of Southern California contain fossils of Pleistocene elephants and ancient trees, and furnish noteworthy examples of ancient volcanism, deposition, and active sea erosion, and have situated thereon various other objects of geological and scientific interest; and

WHEREAS it appears that it would be in the public interest to reserve such lands as a national monument, to be known as the Channel Islands National Monument:

Establishment.

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, under and by virtue of the authority vested in me by section 2 of the act of June 8, 1906, ch. 3060, 34 Stat. 225 (U. S. C., title 16, sec. 431), do proclaim that, subject to all valid existing rights, the following-described lands in California are hereby reserved from all forms of appropriation under the public-land laws and set apart as the Channel Islands National Monument:

34 Stat. 225.
16 U. S. C. § 431.

Description.

All of that part of the Anacapa Island Lighthouse Reservation, a group of three islets known as Anacapa Island, approximate area 700 acres, reserved by Executive Order of September 11, 1854, except the following described parcels of land:

Parcel I. All of the land comprising the east islet of the group lying eastward of West Longitude 119° 22′ 38″ (North American Datum 1927) comprising 106.88 acres more or less.

Parcel II. All of the land comprising the middle islet lying between West Longitude 119° 23′ 21″ and 119° 23′ 30″ and south of Latitude 34° 00′ 14″ North comprising 7.68 acres more or less.

Parcel III. All of the land comprising the west islet lying westward of West Longitude 119° 26′ 10″ comprising 46.72 acres more or less.

Parcel IV. The entire area of Cat Rock, which lies off the southern extremity of the west islet comprising .5 acre more or less.

The area reserved for the national monument on Anacapa Island contains 538.22 acres more or less.

All of Santa Barbara Island, area 638.72 acres, reserved for lighthouse purposes by Executive Order of August 24, 1905, excepting the following-described parcels of land:

Parcel I. Beginning at a point in the high water line at the northwesterly side of the island which bears 258° 50′ true azimuth from north, a distance of 525 feet more or less from the center of Santa Barbara Island North End Light tower; thence 110° true azimuth from north a distance of 1000 feet more or less to the intersection with the high water line

at the northeasterly side of the island; thence along the high water line around the northerly point of the island to the point of beginning comprising 16 acres more or less.

Parcel II. Beginning at a point in the high water line at the southwesterly side of the island which bears 223° true azimuth from north a distance of 300 feet more or less from the center of Santa Barbara Island South End Light tower; thence 90° true azimuth from north a distance of 800 feet to a point; thence 330° 30′ true azimuth from north a distance of 2150 feet to a point; thence 270° true azimuth from north a distance of 800 feet more or less to the intersection with the high water line at the westerly side of the island; thence southerly along the high water line to the point of beginning comprising 40.96 acres more or less.

The area reserved for the national monument on Santa Barbara Island contains 581.76 acres more or less.

Former reservations superseded. The reservation made by this proclamation supersedes as to any of the above-described lands affected thereby the withdrawal made by Executive Orders of September 11, 1854, January 26, 1867, and August 24, 1905. However, the lands excepted in the above descriptions shall remain under the jurisdiction of the Bureau of Lighthouses of the Department of Commerce, as provided by the Executive orders referred to. The Bureau of Lighthouses of the Department of Commerce shall have the right of ingress and egress as to any part of Santa Barbara Island for the purpose of transporting all necessary equipment for servicing the established lights.

Jurisdiction over lands.

Bureau of Lighthouses, right of ingress and egress.

Reservation from settlement, etc. Warning is hereby expressly given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument, and not to locate or settle upon any of the lands thereof.

Supervision. The Director of the National Park Service, under the direction of the Secretary of the Interior, shall have the supervision, management, and control of this monument as provided in the act of Congress entitled "An act to establish a National Park Service, and for other purposes," approved August 25, 1916, 39 Stat. 535 (U. S. C., title 16, secs. 1 and 2), and acts supplementary thereto or amendatory thereof.

39 Stat. 535. 16 U. S. C. §§ 1, 2.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this 26 day of April in the year of our Lord nineteen hundred and thirty-eight, and of the [SEAL] Independence of the United States of America the one hundred and sixty-second.

FRANKLIN D ROOSEVELT

By the President:
SUMNER WELLES
Acting Secretary of State.

DOCUMENT 3

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
Sequoia National Park
Sequoia National Park, Calif.

May 29, 1940

MEMORANDUM FOR THE DIRECTOR:

In connection with a report I am now preparing on the Channel Islands National Monument, I need some information as to just how far out to sea our authority in this area extends. In other words, do we have any jurisdiction over the coastal waters of these islands? If we do not have such jurisdiction, do you think it would be possible to extend the monument boundaries so that they would include one-half or a mile ocean strip around the entire group?

In addition to the islands specifically described as being included in the monument, there are some smaller islands or perhaps rocky promontories standing off the coast which are very important bird nesting areas, and I wonder if these should be considered part of the monument, or if we should attempt to have the original proclamation revised so as to include them as well as the ocean waters mentioned above.

/s/ E. T. Scoyen
E. T. Scoyen
Superintendent

DOCUMENT 4

UNITED STATES
DEPARTMENT OF THE INTERIOR
Fish and Wildlife Service
Washington

January 30, 1941.

MEMORANDUM for Mr. Ben Thompson.

Attention: Mr. Little.

Reference is to Mr. Collins' suggestion that you be supplied with a wildlife comment regarding Mr. Moskey's memorandum to Mr. Wirth of January 17, on protection of natural features or plants or animals in the Channel Islands National Monument.

The outlying rocks and islets in the neighborhood of the main islands should certainly be designated as a part of the National Monument. Such important wildlife species as the sea otter, sea elephants, and fur seals, which badly need protection, prefer such places to the shores of larger islands. Frequently animals like these may be seen resting on bits of rock that barely offer support and over which the sea may break. Therefore, such protection as the National Monument can offer should be extended as widely as possible.

Unfortunately, it is understood that the Monument can not be extended to cover the actual surface of the surrounding ocean, although this too would be desirable for protection of these marine mammals.

/s/ Victor H. Cahalane
Victor H. Cahalane,
In Charge,
Section on National Park Wildlife.

DOCUMENT 5

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
Sequoia National Park
Sequoia National Park, Calif.

April 1, 1941

A. Brazier Howell, Executive Secretary,
Council for the Conservation of Whales,
American Society of Mammalogists,
Johns Hopkins Medical School
Baltimore, Maryland.

Dear. Mr. Howell:

I have your letter of March 19, with reference to conditions on the Channel Islands National Monument.

At the present time this Service has control of only a very small part of the Channel Islands group, consisting of Santa Barbara Island and the Anacapa Group about forty miles to the north. The other islands are in private ownership or have been reserved for use by the Army or the Navy.

At Santa Barbara Island we have had reports and observations which indicate that the elephant seal has taken up his residence there. An inspection party from this park observed seven of these large mammals, and scientific societies operating expeditions out of Los Angeles have also reported their occurrence. The Los Angeles Museum has reported one sea otter in the vicinity of Santa Barbara Island.

At the present time no funds are allotted for patrol or protection of these islands, although we do have some sort of agreement with the Coast Guard that they will look out for the area. In the near future we intend to assign a man to Santa Barbara Island principally to try and reduce the population of wild house cats which infest this island and take a great toll of the bird life. However, he will no doubt make further observations with reference to the elephant and fur seals, although none of the latter has been reported at this island so far as I know, and also the sea otter.

Our principal difficulty from a protection standpoint arises in the situation that we are able to give protection to these animals only as long as they are on our beaches; the moment they slip off into the water we lose control over them. We have had, and probably will continue to have, close cooperation with the State of California in protecting these rare species after they enter the sea. In any event, there is definite evidence that the sea life which you mention, except for the fur seal, is trying to establish itself on Santa Barbara Island.

Sincerely yours,
E. T. Scoyen
Superintendent

CC: Director
Region IV

DOCUMENT 6

November 15, 1941.

MEMORANDUM for Mr. Ben Thompson, Room 5213.

Mr. Drury recently discussed with me the problem of protection of seals, sea lions, and sea elephants at the Channel Islands National Monument. Superintendent White's statement in his memorandum of October 29 that "the chief protection needed is in the waters adjoining the islands" is supported by a number of authorities within and without the National Park Service. From a perusal of the files it is not apparent that the possibility of extending the boundaries of the National Monument to include the surface of the adjacent ocean has ever been considered. It would seem that the boundaries of the Fort Jefferson National Monument which extend a considerable distance from the high and low tide marks of the Dry Tortugas Islands would be a precedent.

Victor H. Cahalane,
In Charge,
Section on National Park Wildlife.

DOCUMENT 7

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Chicago, Illinois

April 10, 1946.

MEMORANDUM for the Files. Comment on Channel Islands.

The Channel Islands are rather bleak in their general aspect. They will never be known for outstanding scenic beauty.

I understand the ravines that have had some protection from grazing contain some botanical species of the redwood age that are now extinct on the mainland.

The ocean life is spectacular; the underwater world is the big show along with that which lives at the water's edge.

The reservation should extend off shore to protect the underwater life.

The monument is on several islands. Considerable land acquisition will be necessary for proper protection and operation.

My impression is that there will be little appeal for overnight facilities. These should be of the primitive type of an outpost. A trip to the islands is primarily an exploration trip on a boat: make a landing for a few hours and go on. Such trips can be made from the coast at Santa Barbara and from San Pedro and Catalina.

If a reasonable acreage could be obtained on Catalina, say near the isthmus at the northern end of

the island, the National Park Service could have its museum and information facilities there and tell the Channel Island story to larger numbers of people. A boat tour could be made by those who could afford it and who were truly interested, to the other islands to see nature's big underwater show. Those who are only casually interested, or could only afford the Catalina Island trip, could learn a good deal at the Catalina base. Furthermore, Catalina has a good exhibit itself that has been damaged but not destroyed. By using it to tell the story to crowds, we can leave unspoiled other islands for observation.

Furthermore, Catalina and Santa Barbara can furnish the hotels and other facilities. Let these be the Yosemite Valley floor and the other islands the back country.

(SGD.) THOS. C. VINT
Chief Landscape Architect.

DOCUMENT 8

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Washington

May 31, 1946.

To: Mr. Richey.

From: Mr. Price.

I have received your memorandum of April 12, requesting advice as to the extent of Federal jurisdiction into the waters adjacent to Channel Islands National Monument and the rocks and islands involved in Recreational Withdrawal No. 51. This information is requested in connection with the proposed plan of the Fish and Game Commission of the State of California to reduce the sea lion population in this general area.

The general jurisdictional status of these lands and waters may be described as follows:

1. *Channel Islands National Monument.* Channel Islands National Monument was established pursuant to Proclamation of April 26, 1938, issued pursuant to Section 2 of the Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 431). While the proclamation is not entirely specific on the point, I believe that it should be construed to grant administrative jurisdiction to the National Park Service with respect to the lands described therein only to high water mark. This is indicated by the fact that the description of Santa Barbara Island contained in the proclamation specifically fixes the high water line as the boundary and by the fact that the proclamation refers only to "land" in describing the other islands embraced in the Monument. Since this is the case, the Service has no jurisdiction over the waters adjacent to Channel Islands National Monument.

Whether there is Federal jurisdiction over these waters, apart from that of the National Park Service, involves the question of Federal ownership of submerged coastal lands. This question is the one that is present in the California submerged oil lands dispute. A case based on this precise question is now before the Supreme Court of the United States. Any opinion as to Federal ownership, or jurisdiction, must be reversed until this case has been decided.

2. *Rocks and islands off Point Lobos, California.* The National Park Service possesses no administrative jurisdiction with respect to these Federal lands and the waters adjacent to them. It appears that they were reserved pursuant to Recreational Withdrawal No. 51 and leased to the State of California for park purposes in connection with the Point Lobos State Park. The extent of Federal jurisdiction with respect to these lands which remains, if any, depends on the terms of the lease arrangement with the State. We have been unable to find copies of the lease, but assume that information is available in the General Land Office. If it is desired to pursue this question further, we shall be glad to request the General Land Office to send us a copy of the lease.

Federal jurisdiction over the waters adjacent to the rocks and islands off Point Lobos involves the same considerations as those described for the waters adjoining Channel Islands National Monument. For this reason, a determination of this question also must be reserved, pending a decision in the Supreme Court case.

(SGD) JACKSON E. PRICE
Chief Counsel.

DOCUMENT 9

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Region Four
San Francisco 5, California
601 Sheldon Building

March 24, 1947.

MEMORANDUM for the Regional Director, Region Four.

In a memorandum of March 3, the Regional Chief of Lands requests the comment of the Division of Natural History regarding the existing boundaries of Channel Islands National Monument, with special reference to "Gull Island." Studies of this area have been made in previous years and the subject has been discussed with the Regional Naturalist, who concurs in the present comment.

As stated in the above mentioned memorandum of March 3, "Gull Island" is about 2,000 feet from Santa Barbara Island, and is a detached fragment of the latter. Its exclusion from the proclamation describing the boundaries of Channel Islands National Monument appears to have been wholly unintentional, and a result of the wording of the proclamation, rather than the original intent of the investigators of the area, or those who framed the proclamation.

Actually, "Gull Island" has unique features which render its inclusion within the Monument unusually important. The reason for its importance is that neither cats, rabbits, nor domestic sheep, which in times past have ravaged the main island, appear ever to have

reached "Gull Island." Consequently, the latter now constitutes the only remnant of Santa Barbara Island where some of the murrelots remain that once nested in great colonies in burrows on Santa Barbara Island proper. Similarly, it is believed that exotic weeds, which overran the main island during the years that sheep grazed there, are absent from "Gull Island," and that the original island flora has been undisturbed by sheep or domestic rabbits.

"Gull Island" can be reached by a small boat, though with considerable difficulty. In addition to its very great scientific value based on the above-described conditions, it is a spectacular bit of wild marine landscape like the off-shore rocks on the Oregon Coast. Another important reason for including it in the Channel Islands National Monument would be to prevent its use as a vantage point from which commercial fishermen might shoot sea lions in the water adjacent to the main Santa Barbara Island.

An amendment of the wording of the proclamation to include this natural unit of Santa Barbara Island is urgently needed.

(SGD) LOWELL SUMNER
Lowell Sumner,
Biologist.

DOCUMENT 10

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Region Four
San Francisco 5, California
601 Sheldon Building

April 8, 1947.

MEMORANDUM for the Superintendent, Sequoia-Kings Canyon.

Reference is made to our memorandum of March 17 to the Director, submitting Boundary Status Report for the Channel Islands National Monument. That report bore a footnote as follows:

> "It has recently been noted that south and west of Santa Barbara Island and about 2000 feet distant, there is another small island known as 'Gull Island'. This is about 1200 feet in length by about 700 feet. The proclamation does not appear to include this island. Some study is being given to this fact at the present time by the Wildlife Section which believes the island has importance."

In this connection there is now attached copy of a memorandum dated March 24, by Biologist Lowell Sumner, in which he has given his views on the island in question. Your comments will be appreciated at your convenience.

(SGD) HERBERT MAIER
Herbert Maier,
Acting Regional Director.

DOCUMENT 11

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Region Four
San Francisco 5, California

May 13, 1947.

MEMORANDUM for the Director.

Reference is made to our memorandum of April 8 to Superintendent John R. White regarding Gull Island which lies immediately adjacent to Santa Barbara Island, one of the group composing the Channel Islands National Monument. Copy of that memorandum was sent to your office with copy of Mr. Sumner's memorandum of March 24 advocating inclusion of the island in question, in the monument.

There is now attached copy of Colonel White's reply of April 18 suggesting, in regard to protection, that "It might be better to wait until we are able to do something about the Channel Islands National Monument before we try to take in more territory".

We agree with Colonel White that any direct Service protection of this monument is negligible; however if the island were placed in monument status, that in itself would assure some protection, and we could hope for the same direct protection we have received in the past from the State Division of Fish and Game, and the U. S. Coast Guard.

The island itself is only 2000 feet from Santa Barbara Island, is about 1200 feet long by 700 feet wide and probably contains not more than 15 acres in area. We do not think there would be objections voiced

on anybody's part as to its inclusion. Mr. Sumner's memorandum speaks for itself as to the values and the need of the addition from a wildlife point of view.

Our recommendation would be that either the original proclamation be amended to include Gull Island by name and description, or that a new proclamation be issued to add it to the monument, unless your office feels there is some objection to any addition being presented at this time.

O. A. Tomlinson,
Regional Director.

DOCUMENT 12

[Handwritten original on printed form]

Office Memorandum
United States Government

DATE: 5/26/47

TO: Mr. Richey
SUBJECT: Extension: Channel Islands National Monument

I concur with the Region's recommendation to take Gull Island into the monument. It should be done without undue delay, before someone initiates a scheme for building a hotel or some other commercial enterprise on the island.

/s/ VHC

Concur
CPR
5/26

I concur and recommend we accept any land in Channel Islands. It will be an excellent Pacific Ocean area.
Vint 5/27

DOCUMENT 13

Office Memorandum
United States Government

DATE: June 4, 1947.

TO: Director Drury

FROM: Richey.

SUBJECT: Addition of Gull Island to Channel Islands National Monument.

In his memorandum of May 13, Regional Director Tomlinson recommended that Gull Island be made a part of Channel Islands National Monument. His recommendation, and the justification for this addition, contained in Mr. Sumner's memorandum of March 24 for the Regional Director, appear to me to be sound.

If you approve this recommendation, the next step would be to clear it with interested Congressional delegates from California.

Messrs. Vint, Russell, and Cahalane concur in this proposal. If you are agreeable to it, would you please indicate by signing on the line provided below?

/s/ C.A.R.
Acting Chief of Lands.

Approved:

/s/ Newton B. Drury
Director.

DOCUMENT 14

Office Memorandum
United States Government

DATE: June 6, 1947.

TO: Director Drury.

FROM: Richey.

SUBJECT: Additions to Channel Islands National Monument.

This refers to our discussion of June 5, and to my inter-office memorandum to you of that date which you approved, concerning the addition to Channel Islands National Monument of Gull Island and the off-shore rocks around it and other islands.

In our discussion, I mentioned to you Mr. Vint's view that we should have a base on the mainland and one on Santa Catalina Island to facilitate operations of the monument.

Quoted below is his memorandum of April 14 to me concerning the Boundary Status Report for Channel Islands:

"I think the Channel Island boundaries are inadequate. Some islands should be acquired in their entirety and jurisdiction over the water for some distance (say 1 mile) from shore. [I doubt if the latter is possible. C.A.R.]

"There should be a base on Catalina, possibly a large section near the isthmus, and a base on the mainland near Santa Barbara.

"The boundaries need study in a big way—a preliminary Master Plan should be made."

In our discussion you mentioned that for a number of years there had been available a lighthouse property in the vicinity of Santa Barbara which was excess property and which might serve as a base for the monument. You further mentioned that you believed the University of California may have acquired this property, but that you would check into the matter during your forthcoming trip to California.

The above information is given so that you will have it available for reference on your trip.

/s/ C.A.R.
Acting Chief of Lands.

cc: Mr. Vint.
Mr. Wirth (Washington).

DOCUMENT 15

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Chicago 54, Illinois

June 12, 1947.

MEMORANDUM for the Regional Director, Region Four.

Approval of the Boundary Status Report for Channel Islands National Monument is being withheld pending further study and a determination of the ownership status of Gull Island and other off-shore rocks and islets within one mile from Santa Barbara and Anacapa Islands. A copy of our memorandum of this date to the Bureau of Land Management is attached.

I think it would be well if, in the meantime, you can determine from the local Bureau of Lighthouse officials whether all of the tracts on the two islands excluded from the monument at the time of its establishment are still being used for lighthouse purposes. If not, we should try to have them included along with Gull Island.

(SGD) NEWTON B. DRURY
Director.

DOCUMENT 16

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Chicago 54, Illinois

June 12, 1947.

MEMORANDUM for the Director,
Bureau of Land Management.

Channel Islands National Monument, comprising all of Santa Barbara and Anacapa Islands off the coast of southwestern California, except a few small tracts reserved for lighthouse purposes, was established by Proclamation No. 2281 of April 26, 1938 (52 Stat. 1541), issued under authority contained in section 2 of the act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431). The proclamation effected the transfer of the lands involved from the Bureau of Lighthouses of the Department of Commerce to the jurisdiction of this Department for administration by the National Park Service for national monument purposes.

Gull Island, which lies approximately 2,000 feet southwest of Santa Barbara Island, was not included in the proclamation creating the national monument, yet its control is essential to the proper protection of Santa Barbara and the objects of geological and scientific interest, including marine life, for the preservation of which the monument was established. Therefore, we should appreciate learning the present ownership and jurisdictional status of Gull Island in order to determine the feasibility of its addition to the existing monument by proclamation of the President under the 1906 act.

In this connection, it is equally desirable that this Service have control of the various off-shore rocks and unnamed islets above the surface and within one-mile radii of both Santa Barbara and Anacapa Islands. Are these regarded as public domain?

(SGD) NEWTON B. DRURY
Director.

DOCUMENT 17

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

June 27, 1947.

MEMORANDUM

To: Director, National Park Service

From: Director, Bureau of Land Management.

Subject: Status of Gull Island and off-shore rocks and islets near Channel Islands National Monument, California.

I have received your memorandum of June 12, 1947, requesting the status of Gull Island and certain rocks and islets off the coast of California which are considered essential to the proper protection of the Channel Islands National Monument.

The records will be checked to ascertain the status and you will be informed as soon as possible.

For the Director:
/s/ Byron C. Denny
Chief, Land Classification Division.

DOCUMENT 18

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Region Four
San Francisco, California

July 7, 1947.

MEMORANDUM for the Superintendent,
Sequoia-Kings Canyon National Parks.

Reference is made to the Director's memorandum of June 12 to the Regional Director regarding Boundary Status Report for Channel Islands National Monument. Copy of the memorandum in question has already been sent you.

The Director, in considering the question of adding Gull Island and other off-shore rocks and islets, suggested that we "determine from the local Bureau of Lighthouse officials whether all of the tracts on the two islands excluded from the monument at the time of its establishment are still being used for lighthouse purposes." He says, "If not, we should try to have them included along with Gull Island."

The Lighthouse Service now functions within the U.S. Coast Guard, and apparently these islands come under the control of the Commanding Officer, 11th Coast Guard District, Times Building, Long Beach 2, Calif.

It is suggested that as you have opportunity you make an appointment with the Commanding Officer at Long Beach and endeavor to find out if there are any of the six reserved tracts which are not now being used for lighthouse purposes, and, if so, which they are.

We are inclined to believe that the Coast Guard would not release any of the tracts on which there are existing "beacons". For your guidance and help there is enclosed print of NM/CI-5301 showing in pink those portions under the jurisdiction of the National Park Service, and in yellow the six Lighthouse Reservations.

For your further information there have been rumors that the Navy intends to use the general area of the Channel Island for a "Directed Missiles Proving Ground". This, if true, may have some bearing on the attitude of the U.S. Coast Guard towards release of these tracts.

(SGD) O. A. TOMLINSON
O. A. Tomlinson,
Regional Director.

DOCUMENT 19

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

July 11, 1947

MEMORANDUM

To: Director, National Park Service

From: Director, Bureau of Land Mangement

Subject: Status of islands off coast of Southern California.

Reference is made to your memorandum of June 12, requesting information concerning the ownership and status of Gull Island located some 2,000 feet southwest of Santa Barbara Island, California.

Chart No. 5202, published by the U.S. Coast and Geodetic Survey, shows a small unnamed island about 2,000 feet southwest of Santa Barbara Island. The said unnamed island presumably is the one referred to in your memorandum as Gull Island. We have no information concerning it other than just indicated. If it existed, and was above ordinary high tide in 1850, when California was admitted into the Union, it is considered public land of the United States.

We note that you deem it advisable that your Service have control over the off-shore rocks and islets above ordinary high tide and within one mile of Santa Barbara and Anacapa Islands.

The reservation for national monument purposes of all rocks and islands within one mile of Santa Barbara and Anacapa Islands would include the rocks and

islets mentioned, and Gull Island, and no specific reference to the latter island would be necessary.

If you wish to have these islands added to the Channel Islands National Monument, the bureau will be glad to prepare an appropriate proclamation. In the event you desire at this time to have the islands withdrawn for national monument classification, a public land order to accomplish this purpose will be prepared.

/s/ Fred W. Johnson
Director.

DOCUMENT 20

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Chicago 54, Illinois

July 17, 1947.

Air Mail.

MEMORANDUM for the Regional Director,
Region Four.

We are in receipt of a memorandum of July 11 from the Bureau of Land Management stating that, since Gull Island was apparently above ordinary high tide in 1850, when California was admitted into the Union, it is considered public land of the United States.

The Bureau states further:

> "The reservation for national monument purposes of all rocks and islands within one mile of Santa Barbara and Anacapa Islands would include the rocks and islets mentioned, and Gull Island, and no specific reference to the latter island would be necessary.
>
> "If you wish to have these islands added to the Channel Islands National Monument, the bureau will be glad to prepare an appropriate proclamation."

Please advise us whether Superintendent White has been able to ascertain from U.S. Coast Guard officials the present lighthouse requirements on the islands comprising Channel Island National Monument and their attitude toward releasing any of the lands not now in use. We should appreciate learning also whether Director Drury has been able to check into the matter

of the surplus lighthouse property on the mainland near Santa Barbara, which has been proposed for a headquarters area. The Director discussed this possibility immediately prior to departing for the West, and said he would try to look into the situation.

We will be in a position to submit a form of proclamation to add Gull Island and other off-shore rocks and islets to the monument as soon as this information is at hand. The same proclamation should, of course, include any surplus lighthouse property on the Islands and, if possible, a satisfactory headquarters area on the mainland.

(SGD) J. D. COFFMAN
Acting Director.

DOCUMENT 21

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Washington 25, D. C.

November 10, 1947.

MEMORANDUM for the Regional Director, Region Four.

After careful consideration of your memorandum of October 28, concerning the likelihood that the Navy's directed missile experiments from Point Hueneme will seriously affect Channel Islands National Monument, I am inclined to believe that there might be some advantage to be gained if we were to proceed at once with the addition to the monument of Gull Island and other off-shore rocks within one mile from Santa Barbara and Anacapa Islands. The Bureau of Land Management, as you will recall, indicated in a memorandum of July 11 that it would be satisfactory to proceed with this addition.

If the Navy occupies the lighthouse in connection with these experiments, certainly the biological features of the monument are going to be seriously endangered. It would seem, therefore, that we might be in a better position to protect the area, and particularly the sea lions, if we had unqualified jurisdiction of the coastal portions of the monument.

Would you object if we proceeded to submit a form of proclamation as contemplated originally?

(SGD) NEWTON B. DRURY
Director.

DOCUMENT 22

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Region Four
San Francisco, California
601 Sheldon Bldg.

November 18, 1947.

MEMORANDUM for the Director.

Reference is made to your memorandum of November 10 in connection with the proposal that Gull Island be added to the Channel Islands National Monument.

We see no objection to immediate preparation of a proclamation which would enlarge the Monument so as to include Gull Island and other off-shore rocks within one mile of Santa Barbara and Anacapa Islands. It is our feeling that it is only by such status that there will be recognized authority to protect the wildlife and other values.

Attached is copy of Biologist Sumner's memorandum of November 18 suggesting that when this addition is made, the Department enter into a Co-operative Protective Agreement with the Navy Department by which the latter will instruct its personnel to "protect" all wildlife. Not only would this give us equivalent police protection, but it would serve to create a personal interest and greater understanding of such types of conservation on the part of the Navy personnel and one which ultimately would reach an even wider field than this particular Monument. We believe Mr. Sumner's

suggestion is very good and that such an arrangement would be of inestimable value to this Service in view of our complete lack of protective personnel in the area.

/s/ O. A. Tomlinson
O. A. Tomlinson,
Regional Director.

DOCUMENT 23

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Region Four
San Francisco, California
601 Sheldon Bldg.

November 18, 1947

MEMORANDUM for the Regional Director, Region Four.

The Director's memorandum of November 10 points out that wildlife may be adversely affected if lighthouse buildings and other facilities on the Channel Islands National Monument are occupied by the Navy in connection with its guided missile research program. Because of this possible danger, the memorandum suggests that the Service should proceed, as originally planned, with submission of a proclamation adding Gull Island and other off-shore rocks to the Monument.

Inclusion of these off-shore rocks is a wise protective measure. However, it appears that we might easily go further and secure important additional protection for the entire Monument. Recently, at the urging of prominent conservation organizations, the Navy wholeheartedly agreed to administer the bird rookeries of the South Pacific as wildlife sanctuaries, and to restrain its personnel from molesting them. In view of this fact, it is believed that the Service could easily secure a cooperative agreement from the Navy for protection of the Channel Islands National Monument.

A formal request for cooperation in protecting the wildlife and other natural features of the Monument

probably should be made to the Secretary of the Navy from the Secretary of the Interior. Following such an agreement the Superintendent and the Region Director, or his representatives, could meet informally with Navy officials in immediate command of operations in the Channel Islands area and secure their personal cooperation. Occupation of the Monument by Navy personnel under a strict cooperative agreement for protection would be a real improvement over conditions existing before the war, when irresponsible hunters and fishermen could land and shoot up the wildlife rookeries with little or no interference.

In addition to the above protection measures it is strongly urged that arrangements be worked out as soon as possible for an inspection of the Monument next April by members of this office who have never seen the area. It is quite possible that we may not have another opportunity to make an unhampered inspection for several years. In view of the policy decisions that are continually being forced upon the Service in connection with this Monument, personal familiarity with the area on the part of staff members is imperative.

Lowell Sumner,
Biologist.

DOCUMENT 24

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Washington 25, D.C.

December 16, 1947.

MEMORANDUM for the Regional Director, Region Four.

As the situation with respect to the boundary of Channel Island National Monument has changed considerably since the Boundary Status Report for that area was prepared last year, we are returning the report for revision. In the meantime, we are proceeding with the preparation of a proclamation to add to the monument all islets, rocks, and waters within one nautical mile of Santa Barbara and Anacapa Islands excepting, of course, the lighthouse reservations.

I am not inclined to agree entirely with your recommendation of August 5 "that no further consideration be given to the procurement of a headquarters on the mainland." I believe that if the area is worthy of retaining its status within the National Park System, it is deserving of a comprehensive study and a Master Plan so that our real needs can be known.

I agree with Biologist Sumner's suggestion that the Department enter into a cooperative protective agreement with the Navy Department whereby the latter will instruct its personnel to "protect" all wildlife in the area. This action should not be initiated, however, until after the proclamation is signed.

(SGD) NEWTON B. DRURY
Director.

DOCUMENT 25

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Region Four
San Francisco 5, California
601 Sheldon Bldg.

December 31, 1947.

MEMORANDUM for the Superintendent, Sequoia.

Reference is made to the matter of the Boundary Status Report for the *Channel Islands National Monument* submitted to the Director on March 17, 1947, by this office.

There has been considerable correspondence back and forth on this subject, much of which had to do with the suggestion that "Gull Island and other offshore rocks and islets within one mile" be added to the Monument.

It appears that the Director is having the necessary proclamation prepared covering the above mentioned additions. In the meantime it is requested that you prepare the usual four copies of a revised Boundary Status Report and submit three to this office. Your report should include these proposed changes and indicate a "2" classification.

It will be seen from the Director's memorandum of December 16, copy attached, that he suggests we carry out Biologist Sumner's recommendation that the Department enter into a cooperative protective agreement with the Navy Department whereby the latter will instruct its personnel to "protect" all wildlife in the area. However, Mr. Drury says this should not

be initiated until the proclamation is signed, at which time, if you are agreeable, we will have Mr. Sumner discuss the subject with local officers of the Coast Guard. The matter may have to go subsequently to the San Diego District.

O. A. Tomlinson,
Regional Director.

DOCUMENT 26

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Region Four
San Francisco, California
601 Sheldon Bldg.

January 13, 1948.

MEMORANDUM for the Superintendent, Sequoia.

Attached is copy of proposed letter to the President from the Secretary of the Interior enclosing a suggested proclamation which would add Gull Island, and other off-shore islets within one nautical mile, to the Channel Islands National Monument.

It should be noted that the enclosed communication is for "information only" since it has not yet been signed by the Secretary. Incidentally, the matter should still be considered in the confidential stage.

Mr. Sumner reminds me that you had promised sometime to bring up to the regional office the 400-foot reel of your movies of the Channel Islands. These pictures have never been shown in the regional office, so may I suggest that the next time you visit San Francisco you be kind enough to bring them with you. Many members of the staff are anxious to see them.

(SGD) O. A. TOMLINSON
O. A. Tomlinson,
Regional Director.

The Secretary of the Interior
Washington 25, D.C.

National Park Service Office Copy

My dear Mr. President:

Through the Bureau of the Budget.

Channel Islands National Monument, comprising all of Santa Barbara and Anacapa Islands off the coast of southwestern California, except a few small tracts reserved for lighthouse purposes, was established by Proclamation No. 2281 of April 26, 1938 (52 Stat. 1541), issued under authority contained in section 2 of the act of June 8, 1906 (34 Stat. 225, 16 U. S. C. 431). The proclamation did not, however, include several small islets and rocks, the control of which is essential to the proper protection of the objects of geological and scientific interest, including marine life, for the preservation of which the monument was established.

I recommend that you sign the attached form of proclamation, which would place under administrative control of the National Park Service the islets, rocks, and waters within a distance of one nautical mile from Santa Barbara and Anacapa Islands. This will afford proper protection to the seals, sea lions, and sea elephants. Some of these species are rare and need absolute protection if they are not to become extinct in American waters.

The above extension of jurisdiction will not involve the expenditure of any additional funds for the administration and protection of the area.

Sincerely yours,

Secretary of the Interior.

The President,
The White House.

Enclosure 781.

DOCUMENT 27

BOUNDARY STATUS REPORT

Name of Area CHANNEL ISLANDS NATIONAL MONUMENT

Date Prepared 1/16/48

Classification 2

Adjustments Recommended:

Channel Islands National Monument, comprising all of Santa Barbara and Anacapa Islands off the coast of southwestern California, except a few small tracts reserved for lighthouse purposes, was established by Proclamation No. 2281, dated April 26, 1938 (52 Stat. 1541) Reference Blueprint NM-CI-7000.

It is now proposed to revise the boundaries of the Monument in order to place Gull Island and all islets, rocks, and waters within a distance of one nautical mile from Santa Barbara and Anacapa Islands under the administrative control of the National Park Service. This is essential to the proper protection of the objects of geological and scientific interest, including marine life, for the preservation of which the Monument was established.

Regional Office notation:—Extension of islets, and rocks mentioned above would be exclusive of lighthouse reservations.

Recommended by: /s/ E.T. Scoyen

Title: Superintendent Date 1/19/48

Concurred: (SGD) HERBERT MAIER

Act'g Regional Director, Jan. 21, 1948

Approved: 7-1 1948

(SGD) Hillory A. Tolson

Acting Director.

DOCUMENT 28

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Region Four
San Francisco, California
601 Sheldon Bldg.

January 21, 1948.

MEMORANDUM for the Director.

In accordance with your memorandum of December 16 we are now submitting in triplicate revised Boundary Status Report for the Channel Islands National Monument.

The revised report includes under "Adjustments Recommended" a proposal to add to the Monument, "Gull Island and all islets, rocks, and waters within a distance of one nautical mile of Santa Barbara and Anacapa Islands." Your office has already agreed to this addition and suggested the wording.

It will be seen that we have added a regional office notation to the effect that lighthouse reservations should be excluded from the proposed extension. This was suggested in your above-mentioned memorandum, and is in line with the wording of the original proclamation. In the circumstances it does not appear that we could do otherwise than follow this principle. Actually this condition might at times create difficulties for the Park Service since the lighthouse reservations would not come under Park Service regulations prohibiting hunting. One

whole island of the Anacapa group is a lighthouse reservation. We presume that technically persons could hunt on a lighthouse reservation unless the Coast Guard, which is now the agent therefor, issued its own regulations prohibiting it.

/s/ Herbert Maier,
Herbert Maier,
Acting Regional Director.

DOCUMENT 29

The Secretary of the Interior
Washington 25, D. C.

July 2, 1948

My dear Mr. President:

Through the Bureau of the Budget.

Channel Islands National Monument, comprising all of Anacapa and Santa Barbara Islands off the coast of southwestern California, except a few small tracts reserved for lighthouse purposes, was established by Proclamation No. 2281 of April 26, 1938 (52 Stat. 1541), issued under authority contained in section 2 of the act of June 8, 1906 (34 Stat. 225, 16 U. S. C. 431). The proclamation did not, however, include several small islets and rocks, the control of which is essential to the proper protection of the objects of geological and scientific interest, including marine life, for the preservation of which the monument was established.

I recommend that you sign the attached form of proclamation, which would place under administrative control of the National Park Service the area within a distance of one nautical mile from the shoreline of Anacapa and Santa Barbara Islands. This will afford proper protection to the seals, sea lions, and sea elephants. Some of these species are rare and need absolute protection if they are not to become extinct in American waters.

Similar protection was given to the extraordinary marine life in the immediate vicinity of the Dry Tortugas group of islands off Key West, Florida, when that area was established as Fort Jefferson National Monument by Proclamation No. 2112 of January 4, 1935 (49 Stat. 3430).

The above extension of jurisdiction will not involve the expenditure of any additional funds for the protection and administration of the area.

Sincerely yours,
(SGD) J. A. KRUG
Secretary of the Interior.

The President,
The White House.

Enclosure 781.

ENLARGING CHANNEL ISLANDS NATIONAL MONUMENT, CALIFORNIA

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS Channel Islands National Monument, comprising all of Anacapa and Santa Barbara Islands off the coast of southwestern California, except a few small parcels of land reserved for lighthouse purposes, was established by Proclamation No. 2281 of April 26, 1938 (52 Stat. 1541), issued under authority contained in Section 2 of the act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431); and

WHEREAS Proclamation No. 2281 did not include several small islets and rocks in the vicinity of Anacapa and Santa Barbara Islands, the control of which is essential to the proper protection of the objects of geological and scientific interest, including marine life, for the preservation of which the Monument was established; and

WHEREAS it appears that it would be in the public interest to extend the boundaries of the Monument to include the areas adjacent to Anacapa and Santa Barbara Islands:

NOW, THEREFORE, I, Harry S. Truman, President of the United States of America, under and by virtue of the authority vested in me by section 2 of the act of June 8, 1906, *supra*, do proclaim that, subject to valid existing rights, the area within one (1) nautical mile of the shoreline of Anacapa and Santa Barbara Islands and as indicated on the diagram hereto attached and forming a part hereof, is reserved from all forms of appropriation under the public-land laws and added to and made a part of Channel Islands National Monument.

The reservation made by this Proclamation shall not affect the lands included in existing reservations for lighthouse purposes, and the right of ingress and egress thereto, as particularly described and excepted in Proclamation No. 2281 establishing the Monument.

Warning is hereby expressly given to any unauthorized persons not to appropriate, injure, destroy, or remove any feature of this Monument and not to locate or settle upon any of the lands thereof.

The Director of the National Park Service, under the direction of the Secretary of the Interior, shall have the supervision, management, and control of this Monument as provided in the Act of Congress entitled "An Act to establish a National Park Service and for other purposes," approved August 25, 1916 (39 Stat. 535, U.S.C., title 16, secs. 1 and 2), and acts supplementary thereto or amendatory thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this day of in the year of our Lord nineteen hundred and forty-eight, and of the Independence of the United States of America the one hundred and seventy-third.

By the President:

Secretary of State.

DOCUMENT 30

180 New Montgomery St.

July 8, 1948.

MEMORANDUM for the Superintendent,
Sequoia-Kings Canyon.

This is to notify you that your revised Boundary Status Report for the Channel Islands National Monument dated January 19, 1948, was approved by the Acting Director under date of July 1, 1948. The latter date should be recorded on your file copy.

Herbert Maier,
Associate Regional Director.

DOCUMENT 31

EXECUTIVE OFFICE OF THE PRESIDENT
Bureau of the Budget
Washington 25, D.C.

Dec. 16, 1948.

My dear Mr. Attorney General:

Herewith is a proposed Executive Proclamation, presented by the Secretary of the Interior, entitled "Enlarging Channel Islands National Monument, California".

The proposed proclamation sets out that the Channel Islands National Monument, comprising all of Anacapa and Santa Barbara Islands off the coast of southwestern California, except a few small parcels of land reserved for lighthouse purposes, was established by Proclamation No. 2281 of April 26, 1938; that the areas reserved by the same proclamation do not include several small islets and rocks in the vicinity of the said islands, the control of which is essential to the proper protection of the objects of geological and scientific interest, including marine life, for the preservation of which the Monument was established; and that it would be in the public interest to extend the boundaries of the Monument to include the areas adjacent to the two islands.

The proposed proclamation provides that, subject to valid existing rights, the area within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands as indicated on the diagram attached thereto

and forming a part thereof is reserved from all forms of appropriation under the public-land laws and added to and made a part of the Channel Islands National Monument.

The Secretary of the Interior advises that the extension of the boundaries of the Monument, as proposed, will afford proper protection to the seals, sea lions, and sea elephants, some of which species are rare and need absolute protection if they are not to become extinct in American waters, pointing out, in this connection, that similar protection was given to the extraordinary marine life in the immediate vicinity of the Dry Tortugas group of islands when that area was established as the Fort Jefferson National Monument by Proclamation No. 2112 of January 4, 1935.

The Acting Secretary of the Navy, by letter of November 9, 1948, enclosed herewith, advises that the Navy Department interposes no objection to the extension of the boundaries of the Monument, as proposed, provided it shall not in any manner curtail the Navy's guided missile test program and the use of land in connection therewith at Point Mugu, and provided further that the Department continues to have the right of ingress and egress to Anacapa Island under its existing arrangements with the Coast Guard.

The Secretary of the Interior, in his attached letter of December 2, gives assurance that issuance of the proclamation will not affect the indicated Navy interest in the area.

Subject to such revision of the form thereof as you may consider appropriate, the proposed proclamation has the approval of the Director of the Bureau of the Budget.

Very truly yours,
/s/ Elmer B. Staats
Assistant Director
Legislative Reference

The Honorable
The Attorney General

Enclosures

DOCUMENT 32

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Region Four
San Francisco 5, California
180 New Montgomery Street

January 14, 1949.

Mr. J. W. Sefton, Jr.,
President, J. W. Sefton Foundation,
Care San Diego Trust and Savings Bank,
San Diego, California.

Dear Mr. Sefton:

Your letter of January 5 to the Director, requesting a permit to make scientific collections from the tide pools of the Channel Islands National Monument, has been referred to this office.

Anacapa Island, as well as Santa Barbara Island, is included in the Channel Islands National Monument. In the case of both areas the monument boundary at the present time is described as the "high water line." Therefore it appears that the collecting that you propose actually will not be within the monument. For this reason no permit will be necessary for your present project.

Time did not permit the issuance by the Director's Office of a collecting permit in accordance with your request. However, should you desire to carry on additional collecting in the future, it may be advisable to have one since there is some possibility that the monument boundary may be extended to include adjacent water in order to eliminate the destructive activities

of persons who have been shooting from boats. If you do wish a permit, please let us know several weeks in advance of collecting.

In order to increase our knowledge of this important scientific national monument and to facilitate our protection program, it will be appreciated if you will share with us any pertinent observations resulting from your visit. We wish you every success.

Sincerely yours,
(SGD) HERBERT MAIER
Herbert Maier,
Acting Regional Director.

DOCUMENT 33

DEPARTMENT OF JUSTICE
Washington
January 28, 1949
MEMORANDUM FOR
THE ATTORNEY GENERAL

Re: Proposed proclamation entitled "Enlarging the Channel Islands National Monument, California"

The attached proposed proclamation is presented by the Secretary of the Interior. It has been forwarded for your consideration by the Bureau of the Budget with the approval of the Director.

The proposed proclamation would enlarge the Channel Islands National Monument, California, to include the adjacent areas within one nautical mile of Anacapa and Santa Barbara Islands. It appears from the accompanying letter of the Secretary of the Interior to the President that the public interest would be promoted by adding these areas to the national monument in order to properly protect the objects of geological and scientific interest for the preservation of which the monument was established.

The Navy Department interposes no objections to the proposed proclamation.

Authority for the proposed proclamation is contained in section 2 of the so-called Antiquities Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 431), which reads as follows:

> "The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric

> structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is hereby authorized to accept the relinquishment of such tracts in behalf of the Government of the United States."

The proposed proclamation originally stated, in addition to the justifiable grounds for enlarging the monument under the above Act, a purpose to protect marine life. It has been the opinion of this office that it is doubtful whether the Antiquities Act permits the establishment or enlargement of a national monument to protect plant and animal life (see Department of Justice Files 90-1-04-317 and 90-1-04-367). Hence the language relating to this purpose has been eliminated from the proclamation.

In addition, revision of the proposed proclamation has been made in this office with respect to form and language but no change has been made in substance. The proposed proclamation, as amended, has been informally approved by the Department of the Interior.

I recommend that you approve the proposed proclamation as to form and legality, and accordingly I have prepared and submit for your signature and consideration a letter to the President in which the proclamation is so approved.

/s/ George T. Washington
George T. Washington
Assistant Solicitor General

DOCUMENT 34

Feb. 7, 1949

Through Division of the Federal Register

The President,
The White House.

My dear Mr. President:

I am herewith transmitting a proposed proclamation entitled "Enlarging the Channel Islands National Monument, California".

The proposed proclamation, presented by the Secretary of the Interior and forwarded for my consideration by the Bureau of the Budget with the approval of the Director, has been revised in this Department with the informal approval of the Department of the Interior.

As revised, the proposed proclamation has my approval as to form and legality.

Respectfully yours,
(SGD) Tom C. Clark
Attorney General

DOCUMENT 35

February 9, 1949
[No. 2825]

ENLARGING THE CHANNEL ISLANDS NATIONAL MONUMENT, CALIFORNIA

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS it appears that certain islets and rocks situated near Anacapa and Santa Barbara Islands, which for the most part form the Channel Islands National Monument, established by Proclamation No. 2281 of April 26, 1938 (52 Stat. 1541), are required for the proper care, management, and protection of the objects of geological and scientific interest located on lands within the said monument; and

WHEREAS it appears that it would be in the public interest to extend the boundaries of the said monument to include the hereinafter-described areas adjacent to the said islands:

Channel Islands National Monument, addition of areas.

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, under and by virtue of the authority vested in me by section 2 of the act of June 8, 1906, 34 Stat. 225 (16 U. S. C. 431), do proclaim that, subject to valid existing rights, the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands, as indicated on the diagram hereto attached and forming a part hereof, are withdrawn from all forms of appropriation under the public-land laws and added to and reserved as a part of the Channel Islands National Monument.

The reservation made by this proclamation shall not affect the lands included in existing reservations for lighthouse purposes, or the rights of ingress and egress appertaining thereto, as particularly described in the said Proclamation No. 2281.

52 Stat. 1541.

Warning.

Warning is hereby expressly given to any unauthorized persons not to appropriate, injure, destroy, deface, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

Supervision, management, etc.

The Director of the National Park Service, under the direction of the Secretary of the Interior, shall have the supervision, management, and control of this monument as provided in the act of Congress entitled "An act to establish a National Park Service, and for other purposes", approved August 25, 1916 (39 Stat. 535; 16 U. S. C. 1 and 2), and acts supplementary thereto or amendatory thereof.

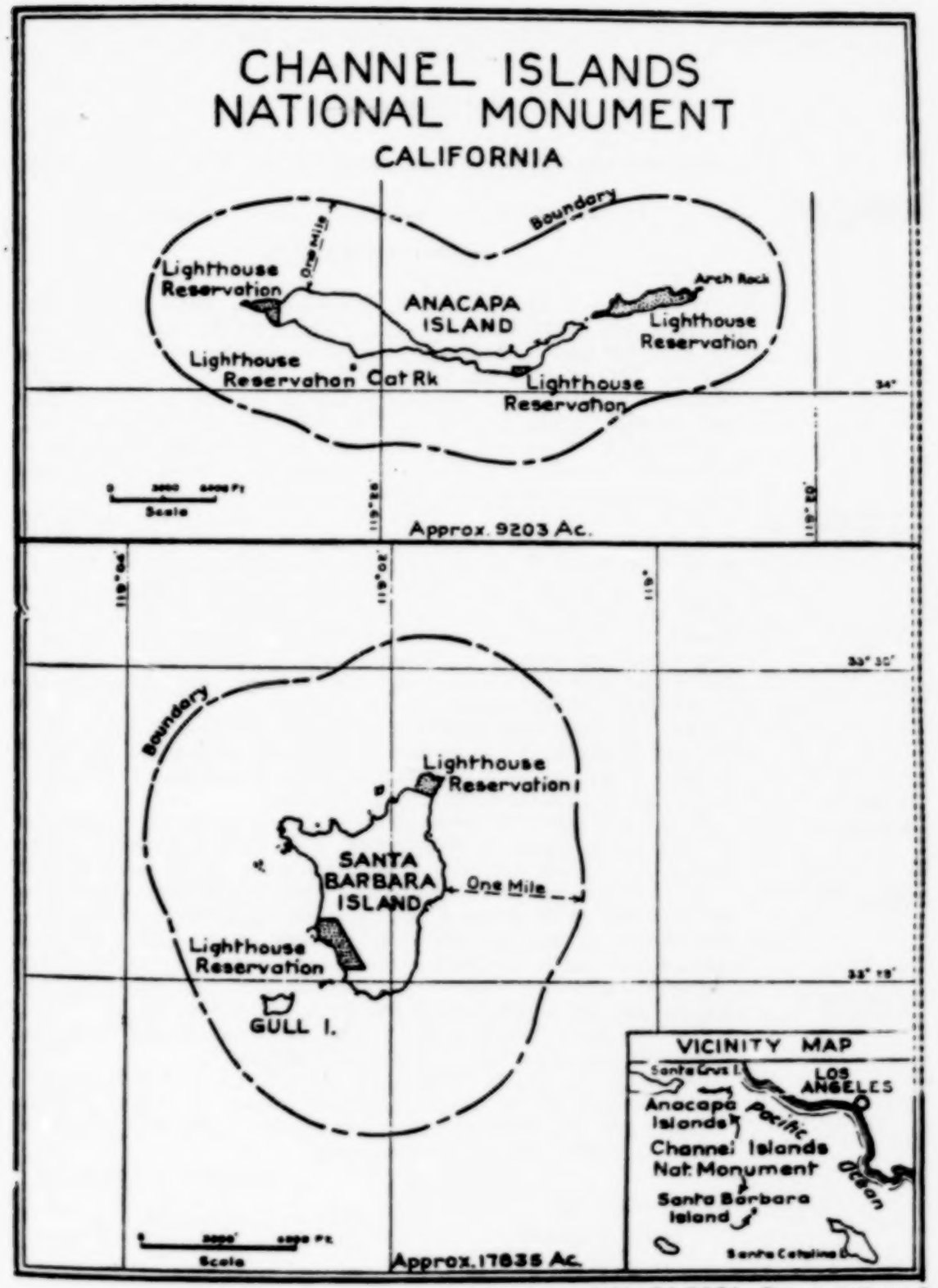
IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this 9th day of February in the year of our Lord nineteen hundred and forty-nine, and [SEAL] of the Independence of the United States of America the one hundred and seventy-third.

HARRY S TRUMAN

By the President

DEAN ACHESON
Secretary of State.



1258-1

DOCUMENT 36

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Washington

May 31, 1949

Memorandum

To: Mr. Drury.

FROM: Mr. Price.

Subject: Jurisdiction of submerged lands at Channel Islands National Monument.

In your note of May 16 you inquire whether the bill recently enacted by the California Legislature to redraw the seaward boundary of the State will affect our jurisdiction over Channel Islands National Monument, which is located about 15 miles from the California mainland.

Although I have not seen the State act, I do not believe that it can affect Federal control and ownership of lands within Channel Islands National Monument, which was recently enlarged by Presidential proclamation to include all areas within one nautical mile of the shoreline of the two principal islands. 14 Fed. Reg. 635. It appears from the newspaper clipping accompanying your note that the California act merely redefines the previously indefinite seaward boundary of the State "to run outside the Channel Islands and other reefs, rocks, adjacent to the mainland."

As you know, the Supreme Court of the United States recently held in the California tidelands case that "California is not the owner of the three-mile marginal belt along its coast; and the Federal Govern-

ment rather than the State has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil." *United States v. California,* 332 U. S. 19, 29-39. Since the Channel Islands are located 15 miles from the mainland, the three-mile marginal belt in this case would necessarily encircle the islands and include the submerged areas recently added to Channel Islands National Monument. If the Federal title, upon which our jurisdiction is based, is a valid one, the State cannot affect this title or jurisdiction by the passage of State legislation.

/s/ Jackson E. Price,
Jackson E. Price,
Chief Counsel.

DOCUMENT 37

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Region Four
San Francisco, California
180 New Montgomery St.

Mr. A. P. Ireland,
Chief, Div. of State Lands,
Room 554 Business and Professions Bldg.,
Sacramento 14, California.

June 13, 1949

Dear Mr. Ireland:

It is our understanding that during the month of April or May 1949 the California State Legislature passed a bill which would indicate by its general language that the State of California lays claim to the waters surrounding the Channel Islands.

The only information we have on the bill is an editorial briefly commenting on it at that time. We do not know the contents of the bill or whether it was intended to embrace the entire group of the Channel Islands. As our Channel Islands National Monument embraces the Anacapa and Santa Barbara Islands *as well as the waters for one nautical mile surrounding those islands,* naturally we are quite interested in the bill.

If it is possible, and not too inconvenient, for you to obtain two copies of the bill we should very much appreciate it. We realize that normally this request

should be made through the Legislative Counsel, but our information is so meager that we thought we would first make inquiries of you.

Sincerely yours,
(SGD) HERBERT MAIER
Herbert Maier,
Associate Regional Director.

DOCUMENT 38

State of California
Department of Natural Resources
DIVISION OF FISH AND GAME
Ferry Building
San Francisco 11, California

July 15, 1949.

TO WHOM IT MAY CONCERN:

The National Park Service has just called to our attention the fact that Santa Barbara and Anacapa Islands, and the waters surrounding said islands to a distance of one nautical mile, comprise the Channel Islands National Monument.

The National Park Service also advises us that they will not permit any use of explosives for any purpose within the boundaries of this National Monument.

In the exercise of any permit previously issued by the California Fish and Game Commission to use explosives for seismic operations, or in the exercise of any permit which may be granted in the future, you will please be governed by this notice.

FISH AND GAME COMMISSION
By
E. L. MACAULAY
Executive Officer

DOCUMENT 39

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Sequoia and Kings Canyon National Parks
Three Rivers, California

February 13, 1950

Memorandum

To: Regional Director, Region Four

From: Superintendent, Channel Islands National Monument

Subject: February 9, 1950 inspection of Anacapa Island

The following is my report on an inspection of Anacapa Island made on February 9, 1950. This concerns general matters and does not cover Mr. Weighill's application, on which a separate memorandum will be prepared.

The trip to the island from Port Hueneme was made on Mr. Weighill's boat the S. S. Vellron. Service personnel who made the trip were Messrs. Maier, Sumner, Kerr and Scoyen.

Conditions on the island appear to have changed but little since I was ashore there the last time in May 1940. Mr. Raymond (Frenchy) LeDreau still maintains residence on the island. Neither Frenchy nor his shack show any change, except that additional junk has accumulated around the place. A thorough cleanup is needed, and this will be done next spring. Meanwhile, I think all are agreed to leave the old Frenchman undisturbed.

Additional problems will arise from the fact that our boundary is now one mile out to sea. There seemed to be some concern over the fact that a kelp reduction plant is in operation at Hueneme. There are fine beds of this sea plant on the south side of the island. I was informed that we could obtain strong support among the sport fishermen along the coast if pressure should develop to harvest kelp in monument waters. As a matter of fact, I think we can count on this support for a general program directed at maintaining the monument and adjacent waters in accordance with accepted Service policies.

The area around Anacapa is considered a prime fishing ground, especially for sport fishing. However, a fairly large ship is needed to cross Santa Barbara Channel under all conditions, and this keeps down the number of trips made by individual fishermen. One lobster boat was noted pulling traps.

/s/ E. T. Scoyen
E. T. Scoyen
Superintendent

DOCUMENT 40

State of California
Department of Natural Resources
Division of Fish and Game
Ferry Building
San Francisco 11, California

June 14, 1950.

National Park Service
Washington, D. C.

Gentlemen:

We have seen reports in the Los Angeles press to the effect that the National Park Service is planning to license fishing resort facilities at the Anacapa Island National Monument. The reports indicate that the National Park Service will prohibit commercial fishing and kelp harvesting in the waters surrounding the Island.

Would you please advise us what your intentions may be. The commercial fishermen and kelp companies operating in this area have expressed concern to us; but before making any representations, we should like to know what is planned.

Very truly yours,
/s/ E. L. Macaulay
E. L. MACAULAY
Executive Officer

DOCUMENT 41

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Region Four
San Francisco, California

July 20, 1950

Memorandum

To: Superintendent, Sequoia and Kings Canyon

From: Acting Regional Director

Subject: Fishing and kelp harvesting in waters surrounding Anacapa Island

Attached is copy of a letter of June 14 from E. L. Macaulay, Executive Officer of the California Division of Fish and Game, to our Washington Office, asking whether this Service intends to prohibit commercial fishermen and kelp harvesting companies from operating within the boundaries of the Channel Islands National Monument, which extend one nautical mile from the shore line of the islands. Attached also is copy of Mr. Taylor's reply of July 6 referring the matter to this office, together with a draft of our proposed letter to Mr. Macaulay, which we are holding until we have obtained your reactions.

As brought out in our proposed letter, there is general agreement here that the kelp beds are essential for wildlife protection and should not be disturbed. With respect to commercial fishing, discussions here have brought out that the Service is not in a very good position to prohibit this activity. Commercial fishing is permitted in the vicinity of Glacier Bay National Monument and elsewhere and, since the fish of the

ocean waters around the monument are not in any way confined to the monument or particularly dependent upon it, we cannot very well claim that we are giving special protection to them. As a matter of fact, we doubt that extensive fishing, either commercial or sports, will take place within one nautical mile of the monument shore line. We believe that the main fishing banks are located far out in the open waters.

We shall appreciate hearing from you as soon as possible on this matter.

C. E. Persons
Acting Regional Director

DOCUMENT 42

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Sequoia and Kings Canyon National Parks
Three Rivers, California

August 2, 1950

Memorandum

To: Regional Director, Region Four

From: Superintendent, Sequoia and Kings Canyon

Subject: Fishing and kelp harvesting in waters surrounding Anacapa Island

The draft of the proposed letter to Mr. Macauley, forwarded with your letter of July 20, is satisfactory. I have no changes to suggest. However, you may desire to point out that restricting kelp operations in an area only one mile wide around such small islands as Anacapa and Santa Barbara certainly will have only the slightest effect on the kelp industry of the State of California.

During our visit to Anacapa and Santa Barbara Islands we also discussed the matter of preserving the native marine life on the rock tidal shelves along the south side of Anacapa Island. It is my intention, before Mr. Weighill gets his operations in full swing, to recommend a regulation prohibiting fishing of all kinds in this area. In other words, the abalone, star fish and other forms of marine life should be left undisturbed for public observation.

/s/ E. T. Scoyen
E. T. Scoyen
Superintendent

DOCUMENT 43

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Washington 25, D. C.

Jan. 22, 1951

Hon. Carl Hinshaw
House of Representatives
Washington 25, D. C.

My dear Mr. Hinshaw:

In accordance with your request made to Chief Historian Ronald P. Lee of this Service, there are enclosed the following data relating to the Channel Islands National Monument, California:

1. A map, dated December 12, 1947, showing the monument area.
2. Copy of the Executive Proclamation of April 26, 1938, establishing the area.
3. Copy of the Executive Proclamation of February 9, 1949, enlarging the boundary.
4. Copy of press release of May 3, 1938, announcing establishment of the area.

The outstanding characteristics of the Channel Islands are a large rookery of sea lions; unique plants and mammals; and fossils ranging from marine invertebrates to Pleistocene elephants. To the casual visitor, the Channel Islands present a rather bleak aspect and they will probably never be known for their outstanding scenic beauty. Anacapa Island, however, presents a rather unusual land form of high vertical cliffs. The Channel Islands National Monument is probably more important as a marine reservation than as a scenic area. The

aquatic life in both the animal and vegetable kingdoms offer outstanding exhibits in the offshore waters. One of the most important steps taken in behalf of the Channel Islands was the declaration of President Truman in February 1949 extending the monument to include the waters for a mile offshore. A protection of this marine life is of vital importance. Professor Setchel, one time head of the botany department at the University of California at Berkeley has advised that the giant growths of kelp which drift offshore on these Islands, and off the sections of the mainland, correspond in under-sea life to the giant Sequoias in life above sea level. The variety of fish, marine animals and the waters offshore of Southern California include those of the northern waters. In other words, there is an overlap which gives a greater variety perhaps of marine animal life than in any other section of our shore.

There has been no progress in a development plan of the Channel Islands National Monument. There will be no need of any overnight accommodations to speak of as Catalina Island can give the visitors such an experience. Could more of the Island group to the north be added to the Monument, then one day the overnight facilities might be of importance. There should, however, be a base, a mainland base, near Santa Barbara and possibly another near Los Angeles. It has also been suggested that a base be established on Catalina, from which exploratory trips to the Channel Islands National Monument could be made. The developments at Anacapa and Santa Barbara Islands at the minimum need to provide landing facilities for small boats and a limited trail system to lead the visitor to overlooks where they might look

down on the shoreline at such points as the one on Anacapa Island where regularly a large colony of sea lions can be seen.

The Channel Islands National Monument is administered under the general supervision of Superintendent E. T. Scoyen of Sequoia and Kings Canyon National Parks, Three Rivers, California. There is as yet no regular appropriation for the area. The National Park Service item in the President's budget for the 1952 fiscal year includes an amount of $4,500 to provide a ranger and other minimum protection for the area.

It is hoped that the above information will be of interest to you and if you wish further data, representatives of this Service who are familiar with the Channel Islands area will be glad to call at your office to discuss it further with you.

Sincerely yours,

(SGD) HILLORY A. TOLSON
Hillory A. Tolson
Acting Director

DOCUMENT 44

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service
Sequoia And Kings Canyon
National Parks
Three Rivers, California

April 8, 1953

Memorandum

To: Regional Director, Region Four

From: Superintendent, Sequoia and Kings Canyon

Subject: Channel Islands National Monument operations

In connection with our operations in the Channel Islands, I wonder just what effect this Tidelands question will have on the monument boundaries, which in that area are set one mile out at sea. I do not know if there is any reason for giving too much attention to the matter.

Among other recommendations Mr. Rutter made in his report on his Channel Island investigations, is that we make the boundaries of the monument the low tide mark. This situation will be covered more in detail when we send in the report.

/s/ E. T. Scoyen
E. T. Scoyen
Superintendent

DOCUMENT 45

April 27, 1953

Memorandum

To: The Director

From: Acting Regional Director, Region Four

Subject: Channel Islands National Monument operations

There is attached a copy of Superintendent Scoyen's memorandum of April 8 in which he wonders just what effect the Tidelands question will have on the Monument boundaries of the Channel Islands.

As you know, Proclamation No. 2825 of February 9, 1949, extended the boundaries of the Channel Islands National Monument one nautical mile from Anacapa and Santa Barbara Islands. The object was to protect the sea life. The kelp beds in this area afford indispensable resting places for certain species of marine birds and mammals. Accordingly this office does not concur in the recommendation by Mr. Rutter that we make the boundaries of the Monument the low tide mark.

Just what effect the pending Tidelands bill will have on the submerged lands which were purportedly set aside and included as a part of the Monument by the Proclamation we do not know. Was this point taken into consideration in the Department's report on the bill?

Please advise.

(SGD) HERBERT MAIER
Herbert Maier
Acting Regional Director

DOCUMENT 46

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
San Francisco Field Office
180 New Montgomery Street
San Francisco 5, California

January 14, 1958

Memorandum

To: Regional Director, Region Four,
National Park Service

From: Field Solicitor, San Francisco

Subject: Jurisdiction Over the Water Areas of Channel Islands National Monument

In recent discussions with you and members of your staff, I have been requested to answer the following three questions relative to jurisdiction over the waters adjacent to Channel Islands National Monument:

1. May the Park Service enforce Park Service regulations in the water area within one nautical mile of the shore line of Anacapa and Santa Barbara Islands?

2. In the event either the Park Service or its authorized concessioner builds a dock at Channel Islands, will it be necessary, if part of the dock has to be constructed on tidelands, to get permission from the State of California to use such tidelands?

3. If San Miguel Island is added to the Monument may the boundaries of such addition include the area within one nautical mile of the shore line of said island?

As indicated to you orally, there have always been some questions in my mind concerning the ownership

and status of the areas within the proclaimed boundaries of Channel Island National Monument which lie beyond the high water mark of the islands constituting the Monument. By Presidential Proclamation 2825, dated February 9, 1949 (3 CFR, 1949 Supp., (p. 17)), it was proclaimed that

> "subject to valid existing rights, the areas within one nautical mile of the shore line of Anacapa and Santa Barbara Islands, * * * are withdrawn from all forms of appropriations under the Public Land Laws and added to and reserved as a part of the Channel Islands National Monument."

The position of the Department with regard to submerged land off the coast of California at the time the Proclamation was issued appears to have been well summarized in the second paragraph of the Solicitor's Opinion of August 8, 1947, M-34985, subject, Applicability of Mineral Leasing Act to submerged coastal areas *below low tide,* (italics added,) which reads as follows:

> "On September 28, 1945, the President issued Proclamation No. 2667, announcing that the 'United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.' (10 F. R. 12303.) And by Executive Order No. 9633 of the same date, the resources of the continental shelf were placed under the jurisdiction and control of the Secretary of the Interior 'for administrative purposes, pending the enactment of legislation in regard thereto.' (10 F. R. 12305.) On June 23, 1947, the Supreme Court held in *United States v. California* (Original No. 12) [332 U.S. 19, 67 S.Ct. 1658] that the Federal Government has paramount rights in and power over the 3-mile marginal belt along the coast, 'an incident to which is full dominion over the resources of the soil under that water area, including oil."

Under the law applicable to submerged lands as summarized by the Solicitor above, it appears to me that Proclamation 2825, issued February 9, 1949, enlarging the Channel Islands National Monument to include areas within one nautical mile of the shore line of Anacapa and Santa Barbara Islands under the authority of section 2 of the act of June 8, 1906 (34 Stat. 225, 16 U. S. C. sec. 431) probably effected a reservation of said areas excepting, perhaps, the narrow belt of tidelands surrounding the islands, that is, the land contiguous to the islands between high and low tide.

Subsequently, however, by the Submerged Land Act of May 22, 1953 (67 Stat. 29, 43 U.S.C. secs. 1301-1315) the states were granted ownership and proprietary use of all lands under their navigable waters for a distance of three geographical miles from their coast lines, or to the seaward boundaries as they existed at the time the states became members of the Union. There is a question as to whether the state's seaward boundary is to be measured from the mainland coast or from the outer island coast. In an article in 54 *Columbia Law Review,* 1021-1048, the author, Attorney Aaron L. Shalowitz, Special Assistant to the Director, United States Coast and Geodetic Survey, states on page 1035 that the act itself lacks the necessary criteria from which a definite answer to this question can

be made and that no Congressional intent can be inferred from the legislative history of the measure other than a desire to leave the question where Congress found it.

It appears, however, that regardless of whether the state's seaward boundary is to be measured from the mainland coast or from the outer island coast, there is little question that the three-mile marginal belt around each offshore island will be construed as having been granted to the states since this seems to follow naturally from the fact that the islands are a part of the territory of the state to which the islands belong. See Report of Special Master, *United States v. California*, Supreme Court No. 6, Original October Term 1952. Order filed November 10, 1952, 344 U.S. 872, 73 S.Ct. 163.

Certain tracts of land, including lands presently and actually occupied by the United States under claim of right, were excepted from the submerged land grant to the states. Section 5, 67 Stat. 32, 43 U. S. C. sec. 1313. This raises the question as to whether lands reserved by Presidential Proclamation for national monument purposes come within the scope and meaning of the terminology "lands presently and actually occupied by the United States under claim of right." I am inclined to doubt that such a reservation will be construed as an exception to the grant.

Based on the research I have made of the incomplete source materials available to me, my tentative conclusion with respect to the questions raised by you and members of your staff are:

1. The Park Service no longer has authority to enforce its regulations in the water area within one

nautical mile of the shore line of Anacapa and Santa Barbara Islands.

2. In the event either the Park Service or its authorized concessioner builds a dock at Channel Islands, it will be necessary, if any part of the dock has to be constructed on tidelands or submerged lands, to get permission from the State of California to use such lands.

3. If San Miguel Island is added to the Monument, such addition may not include the area within one nautical mile of the shore line of said island.

Since the questions raised are novel and concern matters presumably of considerable importance to the Park Service, it may be that the Service will wish to present this matter to the Solicitor for a more thorough study and an authoritative ruling on the subject.

/sgd/ Sidney McClellan
Sidney McClellan
Field Solicitor

DOCUMENT 47

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D.C.

Feb. 14, 1958

Memorandum

To: Assistant Solicitor, Branch of National Parks

From: Associate Solicitor, Division of Public Lands

Subject: Opinion of Field Solicitor dated January 14, 1958, construing the words "actually occupied" as used in the last clause of section 5(a) of the Submerged Lands Act

This refers to your memorandum of February 6, enclosing a copy of an opinion by Field Solicitor McClellan, San Francisco, California, on the subject "Jurisdiction over the water areas of Channel Islands National Monument". Mr. McClellan concludes that since enactment of the Submerged Lands Act of May 22, 1953 (69 Stat. 29; 43 U. S. C., 1952 Ed. Supp. IV, sec. 1301) the Park Service has no authority to enforce its regulations in the water area within one mile of the shore although that water area was withdrawn, reserved and added to the Channel Islands National Monument by Proclamation No. 2825 of February 9, 1949 (3 CFR 1949 Supp., p. 17). He does not believe that this area comes within the exception from the grant of submerged lands to the State encompassed in the words "lands presently and actually occupied by the United States under claim of right."

Assuming an occupancy of the National Monument including the water area consistent with the occupancy of other national monuments in the same general class,

following the date of the proclamation and its maintenance to and after enactment of the Submerged Lands Act, I am not convinced that the Field Solicitor's opinion is correct.

A reading of all of section 5 of the act makes it fairly clear that "lands" as used in the above-quoted clause, includes "lands underlying the marginal sea." "Occupancy" does not mean residence or actual, physical presence on land although it may include both where a consideration of the context shows that to be the intent. The United States has undoubtedly asserted rights to the water area under "claim of right." See *United States v. California,* 332 U. S. 19, for the basis of such claim. Assuming "occupancy" of the area as above, the sole question seems to be whether it was an "actual" occupancy.

Where land was leased for pasture and the lessee constructed stanchions and constructed and repaired fences on the land and used the land when necessary he was in actual occupancy of the land. *Clouse v. Ruplinger,* 290 N. W. 133 (Wisconsin). Where law provided that an action of ejectment shall be brought against the "actual occupant" of the premises it does not mean a servant holding possession but the person having actual use or possession of the property. *People v. Ambrecht,* 11 Abb. Prac. 97, 101 (N.Y.). "Actual occupancy" is defined as an open, visual occupancy, as distinguished from the constructive possession which follows the legal title. "Actual possession" has practically the same meaning. *Parsons v. Prudential Real Estate Company,* 125 N. W. 523 (Neb.). The use of the word "actual" in "actual occupation and possession" implies that the possession shall be real and not speculative or constructive. *Bennett v. Burton,* 44

Iowa 550, 551. See also *Tumlinson v. Swinney*, 76 Am. Dec. 432 (Ark.) and *McIntyre v. Sherwood*, 22 Pac. 937 (Calif.). "Bona fide occupant" as used in the act of January 18, 1897 (29 Stat. 490) is one who has the "use and possession" and the law does not require that he reside on the land. *Frank Johnson*, 28 L. D. 537. "Own and occupy" does not mean "reside upon." *Oinanen v. Ulvi*, 42 L. D. 56.

The tenor of the above-cited and similar decisions construing the words "occupy" and "actual occupant" show that they are usually defined in context and in the light of the apparent intent of the legislature. Where the conditions are such that residence or even substantially continuous presence on the land cannot be said to be contemplated, it is permissible to construe "actually occupied" as being an open, visual occupancy as opposed to constructive possession through mere ownership of the title. Certainly there is every reason to believe that Congress used the words in that sense. It can hardly be thought to have had land above water in mind. "Filled in, built up, or otherwise reclaimed" lands are separately treated in the same section. Congress well knew that the United States did not assert any claim to tidelands which are periodically covered and uncovered by the movement of the tides. Naturally formed lands permanently above high water were not involved. It follows that the quoted phrase could only refer to submerged lands and that "actually occupied" refers to a type of occupation applicable to such lands, exclusive of occupation for such purposes as navigation, elsewhere in the act provided for.

/sgd/ Charles M. Soller
Associate Solicitor
Division of Public Lands

DOCUMENT 48

(Handwritten original)
State of Florida

Executive Department
Tallahassee Sept*r* 17th, 1846

Whereas the Legislature of this State did by a supplementary Act, approved by the Governor July 24th, 1845, entitled, "An Act supplementary to and extending the provisions of An Act assenting to the purchase by the United States and ceding to the same jurisdiction of certain lands on the Island of Key West for the purposes designated in said Act," approved July 8, 1845, authorize and empower the Governor of this State, upon application made to him in behalf of the United States for the cession to the United States of jurisdiction over lands purchased, acquired or owned by them for military purposes, to cede to the United States exclusive jurisdiction over the land or lands so purchased, acquired or owned, and sought to be ceded; And

Whereas, application has been made by the War Department of the United States to the Governor of this State for the cession of jurisdiction to the United States in and over the Islands in the Gulf of Mexico within the limits of this State known as the Tortugas Islands said Islands having been reserved by the United States for Military purposes:

Now therefore be it Known That I, William D. Moseley, Governor of said State in virtue of the authority vested in me by the said supplementary Act, and in pursuance of the provisions thereof, do for and in behalf of the said State of Florida hereby cede unto the Government of the United States jurisdiction over

the said Tortugas Islands within the limits of this State, Said jurisdiction to be subject to the reservations and limitations contained in the said supplementary Act referred to above.

(SEAL)

In witness whereof I have hereunto set my hand and caused the seal of the State to be thereto affixed this seventeenth day of September, in the year of Our Lord, one thousand eight hundred and forty-six.

/SGD./ W. D. MOSELEY
Governor of Florida

DOCUMENT 49

BUREAU OF THE BUDGET
WASHINGTON

DEC. 8, 1934

My dear Mr. Attorney General:

Herewith is the draft of a proposed Proclamation, presented by the Secretary of Agriculture and the Acting Secretary of the Interior, establishing the Dry Tortugas Keys off the coast of Florida as a national monument by authority of the Act of June 8, 1906 (34 Stat. 225).

This Proclamation has my approval as to form.

There is also enclosed the joint letter of the Secretary of Agriculture and the Acting Secretary of the Interior, dated November 17, 1934, presenting this proposed Proclamation, which states that the Secretary of the Navy has agreed to the transfer of jurisdiction of these Islands.

Very truly yours,
/sgd/ D. W. Bell
Acting Director.

The Honorable,
The Attorney General.

Enclosures:
Joint letter of November 17, 1934
Draft of Proclamation.

THE SECRETARY OF THE INTERIOR
WASHINGTON

Nov. 17, 1934.

The President,
The White House.

My dear Mr. President:

We have the honor to transmit for your consideration a proposed proclamation establishing the Dry Tortugas Keys off the coast of Florida as a national monument by authority of the Act of June 8, 1906 (34 Stat. 225). This will revoke the Executive Order of September 17, 1845, establishing the Dry Tortugas Military Reservation and the Executive Order of April 6, 1908, creating the Tortugas Keys Bird Reservation. It also revokes the Executive Order of September 23, 1912, in so far as it closed the port of Tortugas on Garden Key to navigation, and the Executive Order of February 17, 1930, in so far as it forbids air navigation over the closed port.

The Tortugas Keys are under the jurisdiction of the Navy Department, and are subject to a land use restriction as a bird refuge under the Bureau of Biological Survey which it is not necessary to continue as national monuments are wildlife sanctuaries. The Secretary of the Navy has agreed to the transfer of jurisdiction of the Islands. Fort Jefferson, abandoned as an active military reservation many years ago, is of important historic interest, and the Federal Emergency Relief Administration has agreed to restore the old fort as a winter work relief project as well as part of a broad program for stimulating tourist travel as a means of improving economic conditions in Florida.

We recommend that you approve the proclamation, and establish the Fort Jefferson National Monument for administration by the National Park Service of the Department of the Interior.

Sincerely yours,

(Signed) T. A. Walters
Acting Secretary of the Interior

(Signed) H. A. Wallace
Secretary of Agriculture.

Enclosure 584719

DOCUMENT 50

Department of Justice
Washington
December 29, 1934.

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Proposed Proclamation Establishing the Fort Jefferson National Monument

Herewith is a revised draft of a proposed proclamation presented jointly by the Acting Secretary of the Interior and the Secretary of Agriculture and submitted to this Department by the Acting Director of the Bureau of the Budget under date of December 8, 1934.

The proposed proclamation first revokes certain executive orders in whole or in part relating to the Dry Tortugas group of islands off the coast of Florida and then establishes the area embraced in such group of islands as a national monument designated as the Fort Jefferson National Monument. The Dry Tortugas Military Reservation, which was established by Executive Order of September 17, 1845, and the jurisdiction over which was transferred from the War Department to the Navy Department by Executive Order of April 7, 1900, is included in the proposed monument, and the Secretary of the Navy has agreed to such inclusion.

Establishment of the proposed national monument is clearly authorized under section 2 of the Act of June 8, 1906, 34 Stat. 225 (U. S. Code, Title 16, section 431), which provides in part:

> "The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific

> interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

I have considerably revised the original draft of the proclamation in the interest of form and language but no change in purpose has been made. One change, however, may be mentioned. The original draft of the proclamation revoked in full the Executive Order of September 17, 1845, above mentioned. Upon investigation it was learned that this Executive Order applied to lands other than the Dry Tortugas group of islands. The National Park Service, which will have the supervision, management, and control of the monument, has informally advised me that it is neither necessary nor desirable to revoke the Executive Order in question as to any lands other than those included in the Dry Tortugas group. Hence the proclamation has been revised so as to revoke the Executive Order only in so far as it relates to the Dry Tortugas group of islands to be included in the national monument, and thus effectuate the original purpose of the proclamation.

I recommend that you approve the revised draft of proclamation as to form and legality.

I am also submitting a draft of letter for your use in transmitting the proposed proclamation to the President through the Secretary of State.

Respectfully,
/s/ Angus D. MacLean
ANGUS D. MacLEAN,
Assistant Solicitor General.

DOCUMENT 51

Department of Justice
Washington

December 29, 1934.

Through the Secretary of State.

The President,
The White House.

My dear Mr. President:

I am herewith transmitting a revised draft of a proposed proclamation presented jointly by the Acting Secretary of the Interior and the Secretary of Agriculture and submitted to me by the Acting Director of the Bureau of the Budget under date of December 8, 1934.

The proposed proclamation first revokes certain Executive Orders in whole or in part relating to the Dry Tortugas group of islands off the coast of Florida and then establishes the area embraced in such group of islands as a national monument designated as the Fort Jefferson National Monument.

I have revised the proposed proclamation as to form but no change has been made in its purpose, and, as revised, it has my approval as to form and legality.

Respectfully,

(Signed) Homer Cummings
Attorney General.

Supreme Court, U. S.
FILED
NOV 30 1977
MICHAEL RODAK, JR., CLERK

No. 5, Original

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES IN RESPONSE TO CALIFORNIA'S OPENING BRIEF AND IN SUPPORT OF THE UNITED STATES' MOTION FOR A THIRD SUPPLEMENTAL DECREE

WADE H. MCCREE, JR.,
Solicitor General,

JAMES W. MOORMAN,
Assistant Attorney General,

ALLAN A. RYAN, JR.,
Assistant to the Solicitor General,

BRUCE C. RASHKOW,
MICHAEL W. REED,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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Webster's New International Dictionary, Second Edition — 8
Whiteman, 4 *Digest of International Law* (1965) — 25
4 Wigmore, *Evidence*, Section 1048 (Chadbourn rev. 1972) — 23

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 5, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES IN RESPONSE TO CALIFORNIA'S OPENING BRIEF AND IN SUPPORT OF THE UNITED STATES' MOTION FOR A THIRD SUPPLEMENTAL DECREE

JURISDICTION

This suit began when the United States filed a complaint against California invoking the Court's original jurisdiction under Article III, Section 2 of the Constitution. That complaint led to the Court's order and decree in *United States* v. *California*, 332 U.S. 19; 332 U.S. 804. The United States filed a bill in equity in 1963 which resulted in the Court's supplemental decree in *United States* v. *California*, 381

U.S. 139; 382 U.S. 448. Both decrees reserved jurisdiction to enter advisable or necessary further orders.

California has invoked the Court's jurisdiction in moving for entry of a supplemental decree. The United States has opposed that motion and moved for entry of its own supplemental decree.

QUESTIONS PRESENTED

1. Whether the United States by presidential proclamation in 1949 reserved the waters, submerged lands and natural resources within one mile of the Channel Islands National Monument.

2. If so, whether the United States relinquished those areas to the State of California in the Submerged Lands Act of 1953.

STATUTES AND ORDERS INVOLVED

Presidential Proclamation No. 2825 is set forth at pp. 67-68 of the Joint Appendix. Pertinent provisions of the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, are set forth at pp. 89-92 of California's Opening Brief.

STATEMENT

On April 26, 1938, President Roosevelt, acting under the Antiquities Act of 1906, 34 Stat. 225,[1] set

[1] That Act provides in relevant part (16 U.S.C. 431):

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and

aside Anacapa and Santa Barbara Islands, lying about 15 miles off the coast of California near Los Angeles, as the Channel Islands National Monument.[2] Proclamation No. 2281, 52 Stat. 1541, set forth at Joint Appendix ("Jt. App.") 7-8. It is undisputed that the islands were part of the public land of the United States before 1938 and that they have remained so.

In 1945 the United States brought this suit to determine dominion over the submerged lands and mineral resources off the coast of California. Neither the parties nor the Court gave particular consideration at that time to the Channel Islands. In 1947 the Court concluded that the United States had an interest superior to that of California in the offshore submerged lands and resources, *United States* v. *California*, 332 U.S. 19 (*California I*), and decreed, 332 U.S. 804, 805:

> The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of

> other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments • • •.

[2] Anacapa Island is actually three contiguous islets totalling about 700 acres, and Santa Barbara Island is about 638 acres (Jt. App. 7-8; see map at Jt. App. 68). Small areas of each island were retained for lighthouse use and not made part of the Monument, but that retention has no relevance here.

> the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles * * *. The State of California has no title thereto or property interest therein.

Shortly thereafter, in 1949, President Truman enlarged the Channel Islands National Monument from Anacapa and Santa Barbara Islands themselves to include "the areas within one nautical mile of the shoreline" of those islands (Proclamation No. 2825, 63 Stat. 1258, set forth at Jt. App. 67-68). The scope of this proclamation is the central issue of the present proceedings.

In 1953, Congress enacted the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, which relinquished to the states all rights, title and interest which the United States had in lands beneath navigable waters within three miles of the states' coastlines. However, the United States expressly retained "any rights the United States has in lands presently and actually occupied by the United States under claim of right." Section 5(a), 43 U.S.C. 1313(a).

Ten years later, as development of mineral resources continued to move seaward, the United States filed an amended bill in equity in this Court seeking a determination of California's coastline in order to ascertain where California's offshore lands ended and the United States' lands began. The Court's decision in *United States* v. *California*, 381 U.S. 139 (*California II*), defined "inland waters" as used in the Act, *id.* at 150-167, and settled various subsidiary issues, *id.* at 167-177; a supplemental decree was entered. 382 U.S. 448. A second supplemental decree, unrelated to the present dispute and not yet reported, was entered on June 13, 1977.

The issue now before this Court is whether the United States or the State of California controls the submerged lands and waters within one mile of Anacapa and Santa Barbara Islands. The issue arises because the disputed area is rich in kelp which, with the islands themselves, protects sea otters and other marine mammals which the United States is dedicated to preserving. California wishes to carry out its "program of leases for the harvesting of kelp" in the area (Cal. Br. 7). In addition, the undersea plant and animal life around the islands is a beautiful and scientifically valuable resource; indeed, because the islands themselves are not scenic, the underwater life is the prime attraction for skin divers, photographers and naturalists alike.

The first question presented is whether President Truman's 1949 proclamation added to the Monument the waters, resources and submerged lands within one mile of the islands. If so, the second question is whether the United States relinquished that area to California by the Submerged Lands Act or whether it retained the areas as "lands presently and actually occupied by the United States under claim of right," 43 U.S.C. 1313(a).

SUMMARY OF ARGUMENT

President Truman's 1949 proclamation added to the Monument all waters, submerged lands and natural resources within one mile of the islands and not, as California contends, merely the rocks and islets in that area. This Court has held that "lands" used in a reservation of public territory includes adjacent waters and submerged lands if such construction will achieve the purposes of the reservation, and "areas" is the most commodious word that could have been used to denote that more than just rocks and islets were included. The diagram incorporated into the proclamation also shows that all surrounding areas were included.

The history of the 1949 proclamation demonstrates that addition of adjacent waters and submerged lands was necessary to protect the marine life in and around the islands. After this Court's decree in *California I*, federal officials responsible for drafting the proclamation unequivocally stated that waters surrounding the islands were included in the proclamation. Indeed, "areas" was substituted at a late stage in the drafting process for "islets, rocks, and waters."

The contemporaneous interpretation of the proclamation by the United States and California further demonstrates that the expansion of the Monument included adjacent waters and submerged lands. By various public notices and correspondence, California recognized federal authority over these waters in

general and the kelp beds in particular. Federal regulations for the Monument are consistent only with the proposition that federal jurisdiction extends to the waters, submerged lands and natural resources surrounding the islands.

The United States did not relinquish any part of the disputed areas by enactment of the Submerged Lands Act in 1953, for Congress specifically excepted from that Act "any rights the United States has in lands presently and actually occupied by the United States under claim of right." 43 U.S.C. 1313 (a). The parties have stipulated that the United States occupied the waters within the boundaries of the Monument. We believe it is clear that the 1949 proclamation is the claim of right which excepts the areas from the Act.

ARGUMENT

I. PRESIDENT TRUMAN ADDED THE AREAS IN QUESTION TO THE MONUMENT IN 1949

A. The proclamation added to the Monument all "areas," including lands, waters and natural resources, within one mile of the islands.

In 1949, President Truman proclaimed (Proclamation 2825, Jt. App. 67; hereafter "1949 proclamation") that "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands, as indicated on the diagram hereto attached and forming a part hereof, are withdrawn from all forms of appropriation under the public-land laws and added to and reserved as a part of the Channel Islands National Monument." The proclamation's diagram

(Jt. App. 68) shows each island surrounded by a line marked "boundary" one mile from the coast of the island.

California contends (Br. 17-21) that the proclamation did not purport to, and did not, add to the Monument anything but "certain rocks and islets" within the one-mile belt surrounding each island. We believe it is plain that the 1949 proclamation purported to, and did, add to the Monument all waters and lands, submerged or otherwise, within the one-mile belt.

It is as true for presidential proclamations as it is for statutes that "[t]he starting point in every case involving construction * * * is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (Powell, J., concurring). The "language itself" here demonstrates that the disputed lands are a part of the Monument. Webster's New International Dictionary, Second Edition, defines "area", *inter alia*, as synonymous with "[s]pace, region, [or] expanse." As California concedes (Br. 14-17), the word has been authoritatively used to "include space beneath the surface, such as submerged lands" (*id.* at 17). This Court has recognized that a reservation of "lands"—a word narrower than "areas"—"includes as well the adjacent waters and submerged land" if such a construction serves the purpose of the reservation. *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87. See also *United States* v. *Louisiana*, 363 U.S. 1, 69; *Cappaert* v. *United States*, 426 U.S. 128, 138. As we

will show in part B below, the purpose of this reservation was to protect the marine life in the lands and waters within one mile of the islands, and therefore "areas" should be read to include "adjacent waters and submerged lands." Indeed, "areas" is the most commodious word that could have been used in this context to denote that everything within the boundaries, not merely "certain rocks and islets," was added to the Monument. The proclamation could have added all "surface waters, submerged waters, rocks, islets, submerged lands, natural resources" and so on *ad infinitum*, but it sensibly did not. It accomplished the same result by simply adding "areas." And, as we show below, "areas" was substituted in the later stages of drafting as an economical synonym for all things within the one-mile belt.

In addition to the word "areas" itself, the diagram (Jt. App. 68) which was incorporated into the proclamation and is as much a part of it as its very language, shows the one-mile boundary lines surrounding Anacapa and Santa Barbara Islands as enclosing "Approx. 9203 Ac[res]" and "Approx. 17835 Ac[res]," respectively. California acknowledges that these acreage figures describe the total surface area of the islands and surrounding waters, and not merely the "rocks and islets" contained therein (Jt. App. 2). Since California does not contend that the 1949 proclamation added merely surface waters to the Monument,[3]

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[3] Indeed, California argues that any such reading of the proclamation would exceed the authority conferred by the Antiquities Act of 1906. Cal. Br. 52-57.

the fact that the proclamation described the acreage in such terms is persuasive evidence that the proclamation included *all* waters and submerged lands, and not merely "rocks and islets"—a possibility California concedes (Br. 19). Indeed, there would have been no need to measure and record the acreage at all if the proclamation's only concern was with "rocks and islets." And if the proclamation was concerned only with rocks and islets, it is strange that no such features are depicted on the diagram, especially since the proclamation added to the Monument the areas "indicated on the diagram." Neither the materials in the Joint Appendix, nor any other material of which we are aware, nor California itself, identifies, either directly or indirectly, the "rocks and islets" which California contends are the genesis and the subject of the proclamation.[4] It is true that the first whereas clause of the proclamation states that "certain islets and rocks" near the islands are "required for

[4] California offers the suggestion that the diagram's line surrounding the islands, which is clearly labeled "Boundary," "could simply be an envelope line whose function is to indicate that no islets or rocks seaward of the line were added to the Monument by the 1949 proclamation" (Br. 18). But it offers no evidence in support of this speculation except another suggestion that the line in the diagram of the proclamation establishing the Fort Jefferson National Monument (Jt. App. 3-5) might also be an envelope line. The line in the Fort Jefferson National Monument diagram simply encloses those dozens of islands, keys, rocks and other formations in "the Dry Tortugas group of islands" (Jt. App. 3) which were to become the Monument; it provides no basis for treating the "boundary" line, labeled as such, in the present case as a so-called "envelope line" allegedly having a function different from that of a boundary line.

the proper care, management and protection" of the Monument's resources, but, as we show in part B below, this preamble does not define the range of concerns that led to the expansion of the Monument in the 1949 proclamation.

Had President Truman intended to include only islets and rocks in the 1949 expansion of the Channel Islands National Monument, he could have done so explicitly, as President Roosevelt had done with the "islands" in the 1938 proclamation. But the 1949 proclamation did not extend the boundary to include "rocks and islets within one nautical mile"; it extended the boundary to include all "areas within one nautical mile." The language of the proclamation, including the designation of a "boundary" on the accompanying diagram and the inclusion of acreage figures which include water areas, makes the proclamation clear on its face. It is therefore not surprising that California concedes that the areas added to the Monument "might not be the same as the 'certain islets and rocks' described in the first 'Whereas' clause" (Br. 18).

California also argues (Br. 19-20) that the submerged lands adjacent to these islands had previously been reserved by Executive Order 9633 of 1945, and the President therefore could not have intended to include them in the Monument. However, California's premise is erroneous. Executive Order 9633 set aside for the administrative control of the Secretary of the Interior only the natural resources of the continental shelf beneath the high seas. It had

no effect on lands submerged beneath the territorial sea, including the land surrounding these islands. See note 14, *infra*.

California states (Br. 20-21) that the 1949 proclamation as a whole is ambiguous and concedes that it indeed "may indicate an intent to add jurisdiction over * * * perhaps both the water areas and the submerged lands beneath them." This admission stops short of what the circumstances show. The plain words and diagram of the proclamation demonstrate that the President added to the Monument all things—land, water and natural resources, submerged or otherwise—within the boundary line and that California's narrow reading of the proclamation as adding simply "rocks and islets" is erroneous.[5]

[5] *Atwood* v. *Humble Oil & Refining Company*, 338 F.2d 502 (C.A. 5), on which California relies (Br. 16-17), does not support California's position. The lease in that case required the lessee-producer to designate "the area or areas" of the leased property on which it was producing minerals at the expiration of the lease as a condition of extending the lease for those areas. At the time of expiration, the lessee was producing from a single subterranean geological structure and designated the overlying surface as the "area" of production; the lessor contended that the lease required the producer to identify individual subterranean pools of hydrocarbons from which the minerals were being produced. The court concluded that the lessor's contention would fragment the geologic structure, continue the lease only as to the pools themselves, and terminate the lease as to those portions of the structure above, below and around the pools. The court found the lessor's reading of the lease "strained and artificial" and inconsistent with the intent of the lessor's predecessor who had negotiated the lease. *Id.* at 505-506. Thus, *Atwood* does not by any reading support petitioner's contention that "area" is a measurement of surface alone. And since gas and oil deposits are not located on the earth's surface, it is obvious that, while the area of production might be *described* in terms of surface measurement, the area itself, like the area set aside in the 1949 proclamation, was three-dimensional.

B. The History of the 1949 Proclamation and of the Monument Demonstrates an Intention to Add the Adjacent Waters and Submerged Lands to the Monument.

1. The "executive history" of the proclamation shows an intent to include the adjacent waters and submerged lands within the Monument.

It is clear from the language of the 1949 proclamation, including the diagram incorporated into that proclamation, that waters and submerged lands were added to the Channel Islands National Monument. For that reason we believe it is unnecessary to resort to the history of the proclamation to construe it. Nonetheless, the history of the 1949 proclamation, much of which is set forth in the Joint Appendix, supports the conclusion that water areas and submerged lands were included in the Monument.

In brief, this history (Jt. App. 9-65; see also Jt. App. 69-92) shows that following President Roosevelt's creation of the Channel Islands National Monument in 1938, naturalists and National Park Service (NPS) officials feared that the boundaries of the Monument, limited as they were to Santa Barbara and Anacapa Islands, were inadequate to protect the marine mammals and other natural resources in the vicinity of the islands.

Although all agreed that expansion of the Monument's boundaries was necessary to provide the desired protection, California and the federal government were then engaged in the first "tidelands" dispute and it was not clear which had paramount rights in the waters and submerged lands adjacent to the coast. However, after this Court determined in *California I* in 1947 that the federal government had paramount rights in the area, efforts began in earnest to extend the boundaries of the monument to include the water and submerged lands adjacent to the islands. These efforts culminated in the 1949 proclamation.

a. ***Early expressions of the need to expand the Monument's boundaries.***

As early as May 1940, just two years after the creation of the Channel Islands National Monument, its superintendent [6] stated that a "one-half or a mile ocean strip" around the Santa Barbara and Anacapa Islands should be added to the Monument to protect "very important bird nesting areas" (Jt. App. 9). The same official in 1941 noted the presence of sea elephants and sea otters on the islands and stated, "Our principal difficulty from a protection standpoint arises in the situation that we are able to give protection to these animals only as long as they are on our beaches; the moment they slip off

[6] The Monument at that time was under the jurisdiction of the Superintendent of the Sequoia National Park in California.

into the water we lose control over them" (Jt. App. 11-12). The head of the National Park Service's Section on National Park Wildlife agreed that " 'the chief protection needed is in the waters adjoining the islands' " and suggested that an extension of the Monument's boundaries "to include the surface of the adjacent ocean" be considered (Jt. App. 13).[7]

Little if any action was taken during the war, but the scope of the planned expansion broadened substantially in 1946 when the National Park Service's Chief Landscape Architect recommended that the Monument "extend off shore to protect the underwater life" so that tourists could observe at close range "nature's big underwater show" (Jt. App. 14-15). The Chief Counsel of the NPS cautioned that "Whether there is Federal jurisdiction over these waters * * * involves the question of Federal ownership of submerged coastal lands * * * now before the Supreme Court of the United States" in *California I*. "Any opinion as to Federal ownership, or jurisdiction," he concluded, "must be reserved until this case has been decided" (Jt. App. 17).[8]

[7] Although the wildlife chief had earlier stated that he "understood that the Monument cannot be extended to cover the actual surface of the surrounding ocean" (Jt. App. 10), he later discovered that such an expansion "has [not] ever been considered" (Jt. App. 13). Thus his earlier doubts are of little significance.

[8] This memorandum was written in response to the request of the Director of the NPS for "advice as to the extent of Federal jurisdiction into the *waters* adjacent to Channel Islands National Monument and the *rocks and islands*" adjacent to a

In the following months, there were a number of suggestions that Gull Island, lying off the shore of Santa Barbara, be added to the Monument (Jt. App. 18-39). The Director of NPS advocated extending NPS control to "various off-shore rocks and unnamed islets above the surface and within one mile radii" of Santa Barbara and Anacapa, *e.g.*, Jt. App. 29 (memo of June 12, 1947). In those pre-*California I* days, there was much uncertainty as to whether federal jurisdiction could be extended "over the water" (Jt. App. 25).

b. *The impact of California I.*

That uncertainty was resolved when this Court announced on October 27, 1947, its decree in *California I* (332 U.S. 804, 805) that

> The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein.

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state park in California (Jt. App. 16, emphasis added), thus reflecting, even as early as 1946, NPS's consideration of extending Channel Islands National Monument to adjacent waters, and not merely to rocks and islets.

Within weeks of this decree, on December 16, 1947, the Director of the National Park Service, who, as noted above, had earlier recommended adding only "rocks and * * * islets" to the Monument (Jt. App. 29), permanently expanded the scope of the boundary change. In a memorandum to the Regional Director in San Francisco, he noted, in reference to *California I*, "the situation with respect to the boundary of Channel Islands National Monument has changed considerably since the Boundary Status Report for that area was prepared last year", and stated "we are proceeding with the preparation of a proclamation to add to the monument all islets, rocks, *and waters* within one nautical mile of Santa Barbara and Anacapa Islands * * *" (Jt. App. 42, emphasis added).[9]

From this point forward in the executive history of the 1949 proclamation, there is no further authoritative reference to the addition of mere "rocks and islets." [10]

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[9] California's brief (Br. 28) erroneously dates this memorandum as June 16, 1947, rather than its true date, December 16, 1947. The difference is important because this Court did not announce its decision in *California I* until June 23, 1947 (332 U.S. 19); that decision and its subsequent decree induced the federal government to include waters and submerged lands in the Monument's expansion.

[10] The Regional Director in San Francisco, forwarding the Director's December 16 memorandum to the Monument's superintendent, referred to the pending proclamation as adding only rocks and islets (Jt. App. 43-45). Insofar as the forwarding memorandum omitted any reference to waters, it obviously did not fully state the Director's explicit intent

c. *The drafting of the proclamation.*

The expanded scope of the boundary change induced by *California I* is confirmed by the final stages of the proclamation's history. The 1948 letter from the Secretary of the Interior to the President stated in its draft form,

> I recommend that you sign the attached form of proclamation which would place under administrative control of the National Park Service *the islets, rocks, and waters* within a distance of one nautical mile from Santa Barbara and Anacapa Islands. This will afford proper protection to the seals, sea lions, and sea elephants. Some of these species are rare and need absolute protection if they are not to become extinct in American waters. [Jt. App. 46, emphasis added.]

The actual letter to the President, which the Secretary of the Interior signed a few months later, stated

> I recommend that you sign the attached form of proclamation, which would place under administrative control of the National Park Service *the area* within a distance of one nautical mile from the shoreline of Anacapa and Santa Barbara Islands. This will afford proper protection to the seals, sea lions, and sea elephants. Some of these species are rare and need absolute protection if they are not to become extinct in American waters. [Jt. App. 51, emphasis added.]

stated in the December 16 memorandum. The most that can be said in California's favor (Cal. Br. 28-29) is that the Regional Director did not discuss the question whether waters were included. Thus this lack of reference to waters is not significant. In any event, when the Regional Director replied to the NPS Director's memorandum some four weeks later, he correctly referred to the proposal as adding "islets, rocks and waters" (Jt. App. 49; see also Jt. App. 48, 60-61).

There is no evidence that the substitution of "area" in the letter for "islets, rocks and waters" in the draft was meant to be anything other than synonymous. The Secretary simply followed the admirable rule of not using four words where one would do. Furthermore, if, as California contends (Br. 30), "area" was meant to denote only rocks and islets, and not waters, it would have been simpler—and far clearer—to strike the words "and waters" from the draft, as California appears to concede (*ibid.*).[11] There is, in short, no evidence to show, and no reason to believe, that the Secretary meant "area" to be a material change from the "islets, rocks, and waters"

[11] The Secretary's letter referred to "[s]imilar protection" to marine life in the Fort Jefferson National Monument in Florida (see Jt. App. 3-5). Regulations protecting fish, coral, shells and other underwater life had been in effect there since 1939 (4 Fed. Reg. 4958), and specific reliance on this precedent further supports the conclusion that the 1949 proclamation had the same purpose.

California's argument (Br. 31-32) that the Fort Jefferson National Monument did not include water areas because the deed of cession from Florida gave the federal government title only to the islands is not apt. The cession of lands was necessary to create a national monument; they had belonged Florida. The submerged lands belonged to the United States and thus no cession was required. *California I, supra; United States* v. *Louisiana*, 339 U.S. 699; *United States* v. *Texas*, 339 U.S. 707.

used in the earlier draft.[12] The President signed the proclamation virtually as the Secretary had sent it to him.[13]

These circumstances underscore the pertinence to this dispute of the rule of construction enunciated in *Alaska Pacific Fisheries* v. *United States*, *supra*, page 8, that a reservation of lands includes adjacent waters and submerged lands if necessary to carry out the purpose of the reservation.

Again, California is forced to admit (Br. 37) that the proclamation's history, like the proclamation itself, does not fully support the State's position; again, the

[12] The formal changes made by the Department of Justice (Jt. App. 57-59, 62-65; see Cal. Br. 34-36) are without significance to the present dispute. The Assistant Solicitor General excised from the proposed proclamation the stated purpose of "protection of * * * marine life" (compare Jt. App. 53 with Jt. App. 67) because he doubted that the Antiquities Act, 34 Stat. 225, see note 1, *supra*, "permits the establishment or enlargement of a national monument to protect plant and animal life" (Jt. App. 63). Regardless of whether this cautious approach was required by the Antiquities Act (and it probably was not, see *Cappaert* v. *United States*, 426 U.S. 128, 141-142), it does not detract from the uncontradicted evidence that enlargement was in fact motivated by the desire and intent, demonstrated by federal officials at every level, to protect marine life. See Jt. App. 9, 10, 11-15, 18-20, 22, 28, 37, 38, 40-44, 46, 48, 51, 53, 57-58, 60-61. The Assistant Solicitor General confirmed the purely formal nature of his revision by stating that "no change has been made in substance" (Jt. App. 63).

[13] At some point, "area" in the Secretary's draft (Jt. App. 54) became "areas" in the official proclamation. Perhaps "areas" was substituted to denote more clearly waters and submerged lands and to avoid any possible connotation of surface measurement that might be read into "area."

admission is unduly conservative. The history of the proclamation, like the language itself, fully supports the United States' position.

2. The contemporaneous interpretation of the proclamation by California and the United States, and the United States' subsequent administration of the Monument, further demonstrate that the proclamation extended federal control over the waters and submerged lands.

It is well established that "[g]enerally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." *Old Colony Trust Company* v. *City of Omaha*, 230 U.S. 100, 118. Although the 1949 proclamation was not a contract, like a contract it rearranged rights and obligations between California and the United States concerning the areas surrounding Santa Barbara and Anacapa Islands, and therefore the contemporaneous interpretation of that proclamation by both parties is entitled to great weight. As we now show, the United States promptly informed California that the 1949 proclamation enlarged the Monument to include waters, natural resources and submerged lands, and California accepted that position.

A question of the Monument's boundary arose almost immediately after it was extended. Following this Court's decision in *California I*, the NPS was informed that the California legislature had redefined the State's boundaries to "run outside the

Channel Islands" (Jt. App. 69). When asked whether this action could affect federal jurisdiction over the Monument, the Chief Counsel of the National Park Service gave his opinion that "the State act * * * can [not] affect Federal control and ownership of lands within Channel Islands National Monument * * *" (*ibid.*). He concluded that, because "the three-mile marginal belt in this case would necessarily encircle the islands and *include the submerged areas recently added* to Channel Islands National Monument," the California legislation would be ineffective (*id.* at 70, emphasis added).

The National Park Service informed the State of California of these views on June 13, 1949, emphasizing that "our Channel Islands National Monument embraces the Anacapa and Santa Barbara Islands *as well as the waters for one nautical mile surrounding those islands* * * *" (Jt. App. 71, emphasis in original). Within a month the California Department of Natural Resources published a notice which acknowledged that:

> The National Park Service has just called to our attention the fact that Santa Barbara and Anacapa Islands, and the waters surrounding said islands to a distance of one nautical mile, comprise the Channel Islands National Monument.
>
> The National Park Service also advises us that they will not permit any use of explosives for any purpose within the boundaries of this National Monument.

> In the exercise of any permit previously issued by the California Fish and Game Commission to use explosives for seismic operations, or in the exercise of any permit which may be granted in the future, you will please be governed by this notice. [Jt. App. 73.]

Thus, within a few months of the signing of the 1949 proclamation, California clearly recognized and acceded to federal jurisdiction over the waters in the one-mile belt surrounding the islands. This notice is of particular significance in this case because it is inconsistent with California's present contention that it controls these waters. See, *e.g.*, 4 Wigmore, *Evidence*, Section 1048 (Chadbourn rev. 1972).

Less than a year after the 1949 proclamation the question which is now at the heart of this litigation arose—whether kelp harvesting within the one-mile belt would be permitted. In February 1950, the Monument Superintendent foresaw the pressure that later developed "to harvest kelp in monument waters" (Jt. App. 75). Within a few months, California again recognized the authority of the NPS over natural resources—and the kelp beds in particular—when a California official wrote to NPS as follows (Jt. App. 76):

State of California
Department of Natural Resources
Division of Fish and Game

* * * *

June 14, 1950.

National Park Service
Washington, D.C.

Gentlemen:

We have seen reports in the Los Angeles press to the effect that the National Park Service is planning to license fishing resort facilities at the Anacapa Island National Monument. The reports indicate that the National Park Service will prohibit commercial fishing and kelp harvesting in the waters surrounding the Island.

Would you please advise us what your intentions may be. The commercial fishermen and kelp companies operating in this area have expressed concern to us; but before making any representations, we should like to know what is planned.

Very truly yours,

/s/ E. L. Macaulay
E. L. MACAULAY
Executive Officer

California could hardly have expressed its recognition of federal jurisdiction over the kelp beds more explicitly. It raised not the slightest assertion of the State's authority nor the slightest question as to federal authority. California asked only for information of what the federal government intended to do about kelp harvesting.

NPS' response to California's inquiry unfortunately does not survive, but contemporaneous documents reveal that the reply informed California of NPS' position that "the kelp beds are essential for wildlife protection and should not be disturbed." Jt. App. 77; see *id.* at 79. So far as the parties to this case have discovered, California raised no further question of federal authority.

The federal government, acting through the Department of the Interior, has not deviated from its position that since 1949 the Channel Islands National Monument includes all submerged lands and water areas within one mile of Santa Barbara and Anacapa Islands.[14] In response to an inquiry from

[14] California argues (Br. 42-51) that the submerged lands at issue here could not have been added to the Monument in 1949 because President Truman had reserved such lands in 1945 by Executive Order 9633 (Cal. Br. App. 107) and the 1949 proclamation did not *pro tanto* repeal the 1945 order. This argument fails both in premise and conclusion. In the first place, the 1945 order concerned only resources of "the continental shelf beneath the high seas but contiguous to the coasts of the United States." *Ibid.* The lands at issue here are indisputably beneath territorial waters, and California errs in its argument (Br. 43-48) that "contiguous" modifies "high seas" so as to include territorial waters. See Convention on the High Seas, Art. 1, 13 U.S.T. 2312; Whiteman, 4 *Digest of International Law* 499-501 (1965). California's strained interpretation of Senate testimony and the United States' 1947 brief in the present case (Br. 46-48) to support its reading is erroneous; those documents plainly refer to high seas and not territorial waters.

Second, California acknowledges (Br. 49-51) that any reservation of the disputed lands by the 1945 order could be im-

Congressman Hinshaw about the Monument in 1951, the Acting Director of the Park Service explained (Jt. App. 80-82):

> The aquatic life in both the animal and vegetable kingdoms offer outstanding exhibits in the offshore waters. One of the most important steps taken in behalf of the Channel Islands was the declaration of President Truman in February 1949 extending the monument to include the waters for a mile offshore. A protection of this marine life is of vital importance. * * * [T]he giant growths of kelp which drift offshore on these Islands, and off the sections of the mainland, correspond in undersea life to the giant Sequoias in life above sea level.

Federal regulations applicable to Channel Islands National Monument, 36 C.F.R. 7.84, prohibit tampering with "any underwater growth or formation" and forbid any person to "dig in the bottom, or in any other way injure or impair the natural beauty of the underwater scene." The regulations also prohibit tampering with wrecks and restrict the taking of fish "or other marine life." The regulations are consistent only with the position that federal jurisdiction extends to all waters, submerged lands and natural resources within the one-mile boundary. This Court stated in *Udall* v. *Tallman*, 380 U.S. 1, 16, which also involved the Secretary of the Interior's admin-

---

plicitly revoked *pro tanto* by the 1949 proclamation. Assuming *arguendo* that it is necessary to reach this issue, we think the terms of the 1949 proclamation are certainly clear enough to constitute such revocation.

istration of a presidential order reserving public lands for the protection of wildlife:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." * * * "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" [Citations omitted].

The 1949 proclamation's history, contemporaneous interpretation by both parties and subsequent enforcement thus unequivocally reinforce the language of the proclamation itself. The lands, waters and natural resources of the one-mile belt became part of the Monument in 1949. As we will now show, they were not given back to California in 1953.

II. THE SUBMERGED LANDS ACT DID NOT SURRENDER THE LANDS IN QUESTION TO CALIFORNIA

As we have shown in point I, *supra*, the 1949 proclamation reserved to the United States the lands, waters and natural resources within one mile of

Anacapa and Santa Barbara Islands. California contends (Br. 58-84) that the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, returned these areas to California. We disagree. That Act declared, as a general matter, that the States had title to the lands and resources within three miles of their respective coastlines, 43 U.S.C. 1311, 1301 (b), but Congress specifically excepted from the operation of the Act "any rights the United States has in lands presently and actually occupied by the United States under claim of right." 43 U.S.C. 1313 (a). The United States, as stipulated (Jt. App. 1), "presently and actually occupied" the areas covered by the 1949 proclamation. Therefore, the only question is whether it did so "under claim of right." We believe it obvious that the United States did so, and that therefore the Act has no effect on the question to be decided by this Court.

As the legislative history quoted by California demonstrates (Cal. Br. 65-73 *passim*), the "claim of right" exception was added to the Act to preserve to the United States any claims it had to lands it occupied within the area that the Act otherwise would give to the States.[15] We agree with California that the legislative history shows, in the words of Senator Holland, that (Cal. Br. 75):

> it was the purpose of this particular exception to leave the Federal Government exactly in the

[15] Contrary to California's apprehensions (Cal. Br. 72, 76, 78), the United States does not base its claim to the disputed areas on the Submerged Lands Act itself.

> position it now occupies, with such rights as it may have, and with such obligations or responsibilities as it may have, with reference to any lands which it presently and actually occupies by reason of building and maintaining on such lands, installations and the like, under claim of right.

We further agree that the claim of right exception does not preserve to the United States any claim resting solely on the doctrine of paramount right announced by this Court in *California I* (Cal. Br. 76). But no such claim is at issue here. The United States occupied the islands, waters and submerged lands of the Channel Islands National Monument plainly by virtue of President Roosevelt's 1938 proclamation establishing it and President Truman's 1949 proclamation expanding it. Indeed it is hard to imagine a "claim of right" more explicit than a statement by the President of the United States officially proclaiming that the areas are reserved "under and by virtue of the authority vested in" him by a public law passed for just such a purpose by the Congress (Jt. App. 67).

California contends (Br. 79) that the 1949 proclamation was not a "claim of right" because, California urges, a claim of right must be a federal title to the lands, established prior to the proclamation reserving them: "The federal government must claim these lands because it owns or controls them, not just because it reserved them." We are at a loss to understand the significance of this purported distinction,

for which California cites no language in the Act or its history, nor any judicial or other authority. There is not the slightest evidence in the Act or its history that the claim of right must be a formal title. In fact, the contrary is true. Senator Kuchel of California asked, "What does 'claim of right' mean?" Senator Cordon, floor manager of the bill, answered, "Well, it means that the United States is in actual occupancy and claims it has a right to the occupancy." Hearings on S.J. Res. 13 *et al.* (Submerged Lands) before the Senate Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. 1321 (1953).

California's misapprehension may be based on Senator Kuchel's next question:

> Senator Kuchel: And it permits the United States to keep the property in the absence of a title?
>
> Senator Cordon: No; it does not. It leaves the question of whether it is a good claim or not a good claim exactly where it was before. This is simply an exception by the United States of a voluntary release of its claim, whatever it is. It does not, in anywise, validate the claim or prejudice it. [*Ibid.*].

Senator Cordon plainly was saying that the "claim of right" exception preserved whatever rights in land were claimed by the United States, leaving the validity of the claim to another day. California's argument that title is required to except land from the Act amounts to a contention that all claims unsupported by a title were extinguished; that argument is explicitly rejected by Senator Cordon's reply that the

claim of right exception "does not, in anywise, validate the claim or prejudice it."

This exchange was not isolated; Senator Cordon explained again to Senator Kuchel that:

> The bill is a conveyance. Unless we except from the conveyance a tract of ground, *the title of which is in dispute*, and unless we except that we end the dispute, but we end it adversely to the United States." [*Id.* at 1421; emphasis added.]

California protests (Br. 79) that unless "claim" is in effect rewritten by this Court to mean "title," "the federal government could reserve any property owned by another and have a claim of right." In the first place, the land here was not owned by California in 1949; this Court declared in 1947 in *California I* that the State "ha[d] no title thereto or property interest therein." 332 U.S. 804, 805.

In any event, the fact that the government could "reserve any property owned by another and have a claim of right" is irrelevant. The government's claim would be just that—a claim, not a title. The Submerged Lands Act allows the State to contest the validity of any such claim, because, as Senator Cordon stated, "We simply recognize that a claim on the part of the United States exists, and we leave it for the same determination that would be made had no decision of any kind ever been made." Hearings, *supra*, at 1321. Aside from the contention that a "claim" must be supported by a title, California has not mounted any serious attack on the validity of the United States' claim to the "areas" added to the Chan-

nel Islands National Monument in 1949,[16] nor could it do so, since the land at that time was under the complete control of the United States by virtue of this Court's decision in *California I.* California's challenge to the 1949 proclamation is not that it was invalid, but only that, properly read, it added less territory than the United States believes.

Accordingly, California's position (Cal. Br. 79) that the claim of right must be a federal title to these lands, and that the 1949 proclamation reserving the lands is not a "claim," is contrary to the plain language of the Act and to its history.[17]

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[16] See n. 14, *supra.*

[17] California objects (Br. 85-87) to the limitation, in the third paragraph of the United States' Proposed Supplemental Decree, of the State's rights to a distance of 3 miles from the coastline of Anacapa and Santa Barbara Islands. California asserts that its Submerged Lands Act grant of 3 miles is to be measured from any other island or low-tide elevation within 3 miles of the coastline of Anacapa and Santa Barbara Islands. That grant does extend 3 nautical miles from Anacapa and Santa Barbara Islands, and from any other portion of the State's coastline, including low-tide elevations and other islands. However, this proceeding concerns only the boundaries of the Channel Islands National Monument and the effect of those boundaries on the respective rights of the parties to resources of that portion of the seabed. It does not present the question of the determination of the State's coastline for Submerged Lands Act purposes. Nonetheless there are two objections to the language offered by the State. First, it fails, of course, to recognize federal rights to submerged lands within the boundaries of the Monument. Second, it measures California's grant in terms of the limit of the territorial sea, whereas the Submerged Lands Act limits the grant to California to a distance of 3 nautical miles from the coastline. We believe that the State's objection would be overcome by amending the final clause of the third paragraph of the federal government's proposed decree to read, "to a distance of 3 nautical miles from the coastline of California."

CONCLUSION

For the foregoing reasons, this Court should enter a decree in the form proposed by the United States.[18]

Respectfully submitted.

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NOVEMBER 1977.

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[18] In the first paragraph of the proposed decree "excluding the tidelands" should be substituted for "including the tidelands."

An amended decree incorporating this change, and that discussed in note 17, *supra,* is attached as an appendix hereto.

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 5, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

PROPOSED THIRD SUPPLEMENTAL DECREE, AS AMENDED

It is adjudged and decreed that:

1. As against the State of California and all persons claiming under it, the United States owns all of the islands, islets and rocks, excluding the tidelands (defined as the lands between the line of mean high water and the line of mean lower low water), of those islands and islets located within the Channel Islands National Monument established by Presidential Proclamation No. 2281, 52 Stat. 1541, and expanded by Presidential Proclamation No. 2825, 63 Stat. 1258. The State of California has no legal interest in these islands, islets, and rocks.

2. As against the State of California and all persons claiming under it, the United States owns the submerged lands and natural resources located within one geographical mile of the coastlines of Anacapa and Santa Barbara Islands. The State of California has no legal interest in these lands and natural resources.

3. Subject to the powers reserved to the United States by Sections 3(d) and 6 of the Submerged Lands Act, 67 Stat. 31, 32, 43 U.S.C. 1311(d), 1314, the State of California has an interest superior to that of the United States in the submerged lands and natural resources underlying the waters of the Pacific Ocean more than one nautical mile from the coastline of Anacapa and Santa Barbara Islands seaward, to a distance of three nautical miles from the coastline of California.

4. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be necessary or advisable to interpret or give proper effect to this Decree.

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FOR ARGUMENT.

Supreme Court, U. S.
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FEB 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 5, Original

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF CALIFORNIA,
Defendant.

CALIFORNIA'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR ENTRY OF A THIRD SUPPLEMENTAL DECREE

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IN THE

Supreme Court of the United States

October Term, 1977

No. 5, Original

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF CALIFORNIA,
Defendant.

CALIFORNIA'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR ENTRY OF A THIRD SUPPLEMENTAL DECREE

PRELIMINARY STATEMENT

The purpose of this reply brief is to point out that the United States has not answered the great majority of points raised by California in its opening brief. In large measure, the United States has ignored critical points which favor California's position.

At the outset, it must be noted that the United States has abandoned its claim to ownership of the tidelands

surrounding the islands and islets located within the Channel Islands National Monument. The United States claimed these tidelands in its initial pleading with respect to its proposed third supplemental decree. (U.S. Motion 4.) [1] Although the United States has not forthrightly conceded California's ownership of these tidelands, the United States simply omits to mention tidelands at all in its formulation of the "Questions Presented" in its brief. (U.S. Br. 2.)[2] Since the brief for the United States does not respond in any way to California's discussion of the tidelands issue (Cal. Op. Br. 38-42), the federal claim to these tidelands must be deemed to have been abandoned. *See New Haven Inclusion Cases,* 399 U.S. 392, 481 n. 78 (1970). Despite the fact that there was an active controversy respecting ownership of the tidelands when California filed its petition in the instant proceeding, the United States nevertheless proposes a third supplemental decree which would not recognize in any way that California is, in fact and in law, the owner of the tidelands located within the Channel Islands National Monument. Since the United States could not support its claim to the tidelands, it apparently wants this Court to overlook the fact that it ever claimed California's tidelands in the monument. To the contrary, California submits that it is entitled to a decree recognizing that it owns the tidelands

[1] The abbreviated reference "U.S. Motion" refers hereinafter to the "Motion for Entry of a Supplemental Decree (No. 2) [now No. 3] and Memorandum in Support of the Motion of the United States and in Opposition to the Motion of the State of California," filed in December of 1976.

[2] The abbreviated reference "U.S. Br." refers hereinafter to the "Brief for the United States in Response to California's Opening Brief and in Support of the United States' Motion for a Third Supplemental Decree," dated November 1977.

within the Channel Islands National Monument and adjudging that the United States has no legal interest in these lands whatsoever.

California strongly takes issue with the suggestion in the brief for the United States that a decision in favor of California would somehow diminish the protection of " . . . sea otters and other marine mammals which the United States is dedicated to preserving." (U.S. Br. 5.) It should again be noted that the Channel Islands National Monument was created to preserve certain fossils and geologic features, and not marine life. (*See* Cal. Op. Br. 21-23.) This point is clearly made in the first "Whereas" clause of the preamble to the 1938 Proclamation creating the monument. (Jt. App. 7.) That purpose was not altered in the 1949 Proclamation which enlarged the monument. (Jt. App. 67-68.) Indeed, the memorandum prepared by Assistant Solicitor General George T. Washington states that the proposed proclamation submitted to President Truman was revised specifically to eliminate any purpose regarding the protection of marine life. The memorandum makes this point in very strong terms:

> "The proposed proclamation originally stated, in addition to the justifiable grounds for enlarging the monument under the above Act [the Antiquities Act of 1906, 16 U.S.C. § 431], a purpose to protect marine life. It has been the opinion of this office that it is doubtful whether the Antiquities Act permits the establishment or enlargement of a national monument to protect plant and animal life [see Department of Justice Files 90-1-04-317 and 90-1-04-367]. Hence the language relating to this purpose has been eliminated from the proclamation." (Jt. App. 63.)

Since the Channel Islands National Monument was not enlarged for the purpose of protecting marine life, the United States is disingenuous insofar as it suggests that the outcome of this title dispute may have some effect on the protection of marine life. The State of California is no less dedicated than the United States to protecting sea otters and other marine mammals in the one-mile belt around Anacapa and Santa Barbara Islands. Under California law, the northern elephant seal, the Guadalupe fur seal, and the southern sea otter are "fully protected mammals," which may not be taken or possessed at any time except pursuant to permits for necessary scientific research. Cal. Fish & Game Code § 4700. Similarly it is unlawful in California to take any marine mammal except in accordance with the provisions of the federal Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407. Cal. Fish & Game Code § 4500. For purposes of this California statute incorporating federal law by reference, "marine mammals" include sea otters, whales, dolphins, porpoises, seals, and sea lions. Cal. Fish & Game Code § 4500(c). Thus, the United States cannot successfully maintain that a decree in favor of California would reduce in any way the level of protection accorded to marine mammals within the one-mile belt surrounding Anacapa and Santa Barbara Islands.

This case does not find its genesis in the fact that "the disputed area is rich in kelp."[3] It arises because both California and the United States claim jurisdiction over

[3] There may be a veiled suggestion in the Brief for the United States that kelp harvesting would be injurious to marine life in the one-mile belt around Anacapa and Santa Barbara Islands. (*See* U.S. Br. 5.) California denies any such suggestion. Studies by the University of California's Institute of Marine Resources do not disclose any detrimental effects on marine life from kelp harvesting. W. North & C. Hubbs, eds., *Utilization of Kelp-Bed Resources in Southern*

the one-mile belt around Anacapa and Santa Barbara Islands, and these conflicting claims inhibit effective resource management in the area. The agreed record in this case shows that it was not until 1952, three years after the creation of the monument, that funds were budgeted for a ranger and other minimal protection for the Channel Islands National Monument. The monument still depends on the California Department of Fish and Game to patrol the waters around Anacapa and Santa Barbara Islands, and it is for this reason that California seeks a decree that the one-mile belt is under its jurisdiction rather than that of the federal government.

ADDITIONAL STATUTES INVOLVED

California Fish & Game Code § 4500:

> "(a) It is unlawful to take any marine mammal except in accordance with the provisions of the Marine Mammal Protection Act of 1972 (Chapter 31 (commencing with Section 1361) of Title 16 of the United States Code) or provisions of Title 50 of the Code of Federal Regulations, or pursuant to subdivision (b) of this section.
>
> "(b) At such time as federal laws or regulations permit the state to assume jurisdiction over marine mammals, the commission may adopt regulations governing marine mammals and the taking thereof.

California 1968. Since the parties have stipulated that there are no factual issues requiring appointment of a special master in connection with the petitions for entry of a fourth supplemental decree, it would be inappropriate to pursue this extraneous issue any further. Apparently, the United States does not seriously advance this point in view of the fact that it presents no authority whatsoever in support of its suggestion in the brief.

"(c) For purposes of this chapter, 'marine mammals' means sea otters, whales, dolphins, porpoises, seals, and sea lions."

California Fish & Game Code § 4700:

"Fully protected mammals or parts thereof may not be taken or possessed at any time and no provision of this code or any other law shall be construed to authorize the issuance of permits or licenses to take any fully protected mammal and no such permits or licenses heretofore issued shall have any force or effect for any such purpose; except that the commission may authorize the collecting of such species for necessary scientific research. Legally imported fully protected mammals or parts thereof may be possessed under a permit issued by the department.

"The following are fully protected mammals:

(a) Morro Bay Kangaroo rat (Dipodomys heermanni morroensis)
(b) Bighorn sheep (Ovis canadensis)
(c) Northern elephant seal (Mirounga angustirostris)
(d) Guadalupe fur seal (Arctocephalus townsendi)
(e) Ring-tailed cat (Genus bassariscus)
(f) Pacific right whale (Eubalaena sieboldi)
(g) Salt-marsh harvest mouse (Reithrodontomys raviventris)
(h) Southern sea otter (Enhydra lutris nereis)
(i) Wolverine (Gulo luscus)"

ARGUMENT

I

AS A MATTER OF LAW, THE 1949 PROCLAMATION DID NOT ADD THE SUBMERGED LANDS OR WATERS OF THE ONE-MILE BELT TO THE CHANNEL ISLANDS NATIONAL MONUMENT

The essence of California's first argument in its opening brief was that the 1949 proclamation enlarging the Channel Islands National Monument did not add any submerged lands or waters of the one-mile belt to the pre-existing monument. The use of the ambiguous word "areas" in the final draft of the 1949 proclamation made it unclear whether it was the President's intent to add just the "certain rocks and islets" mentioned in the preamble to the monument or whether he intended to add something else in addition. California's review of the executive history of the 1949 proclamation showed that there was no reference whatsoever to submerged lands being added to the monument, although there is some evidence of an intent to add at least the surface areas of the waters in the one-mile belt.

The crux of California's first argument was that, as a matter of law, the 1949 proclamation could not have added the submerged lands of the one-mile belt to the monument because these lands had already been reserved for another purpose in a 1945 executive order. The 1949 proclamation did not effect an implied repeal of the 1945 executive order, and thus the submerged lands of the one-mile belt were not available for addition to the Channel Islands National Monument in 1949. Insofar as the 1949 proclamation may have intended to add the "waters" of the one-mile belt, separate and apart from the underlying submerged lands, these "waters" could not lawfully have

been added to the monument by themselves. The Antiquities Act of 1906 only permits the reservation of "lands" owned by the United States for national monument purposes. 16 U.S.C. § 431. In some circumstances, the reservation of land carries with it an implied reservation of waters or water rights. *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87 (1918); *Cappaert v. United States*, 426 U.S. 128, 138-42 (1976). But neither the Antiquities Act nor any case authority permits the reservation of Pacific Ocean waters for national monument purposes when the submerged lands beneath them have not been reserved as well. (Cal. Op. Br. 52-57.)

A. The United States Has Not Answered California's Point Regarding the Failure of the 1949 Proclamation To Revoke the 1945 Executive Order Which Has Already Reserved the Submerged Lands of the One-Mile Belt.

It is important to focus on the most critical portion of California's argument. If the submerged lands of the one-mile belt had already been reserved pursuant to Executive Order 9633 in 1945, then those lands could not be added to the Channel Islands National Monument in 1949 without a disfavored repeal by implication of the 1945 executive order. (*See* Cal. Op. Br. 42-48.) Lacking an answer to this compelling argument, the United States has responded in a footnote in its brief, perhaps with the vain hope that the significance of California's point will be overlooked. (U.S. Br. 25 n. 14.)

1. The 1945 Executive Order Reserved All the Submerged Lands of the Continental Shelf Seaward of the Ordinary Low Water Mark.

The United States apparently concedes that the 1945 executive order did not reserve the submerged lands of the

Continental Shelf even though the language of the order refers to the "natural resources of the subsoil and sea bed of the Continental Shelf." (*See* Cal. Op. Br. 46-47.) The United States argues, however, that the 1945 executive order only reserved submerged lands beyond the three-mile limit. (U.S. Br. 11-12, 25 n. 14.) In support of this argument, the United States relies on the definition of "high seas" contained in the Convention on the High Seas concluded in 1958 and utilized in the post-1958 materials collected in Whiteman's *Digest of International Law*. (*Id.*) The fallacy of this argument is that there is nothing to support an inference that President Truman used the term "high seas" in 1945 in the sense that was ultimately accepted by the draftsmen of the 1958 Convention on the High Seas. California's opening brief pointed out that the term "high seas" has been used as a term of art in admiralty and other contexts to include all of the ocean seaward of the ordinary low water mark. (Cal. Op. Br. 43.) The United States makes no comment on that point in its brief.

In the context of the 1945 executive order, California also pointed out in its brief that the "high seas" referred to in that order could not be both "contiguous to the coast of the United States" and include only that portion of the ocean beyond the three-mile limit. (Cal. Op. Br. 34.) Either before or after 1945, the "coast" of the United States has never been defined as being as far seaward as the three-mile limit. Since the "high seas" must actually touch the "coast" to be "contiguous" to it, California submitted in its opening brief that the term "high seas" was used in the 1945 executive order as a term of art including that portion of the seas which lies within the three-mile limit. (*Id.*) In response to this compelling textual evidence, the brief for the United States is completely silent.

Moreover, contemporaneous construction of the 1945 executive order by the Department of Interior agrees with California's position that the submerged lands reserved in the order included the lands within the three-mile limit as well as those beyond it. Our opening brief cited the 1945 annual report of Secretary of the Interior Ickes in which he refers to the whole Continental Shelf as being placed under the jurisdiction of his department in that year. (Cal. Op. Br. 43-44.) He does not qualify his report in any way that would indicate that only the lands of the Continental Shelf beyond three miles had been placed under the administrative jurisdiction of his department by the 1945 executive order. To the contrary, he refers in the cited passage to "*all of the ocean floor* around the United States and its Territories that is covered by no more than 600 feet of water." (Cal. Op. Br. 44.) (Emphasis added.) In the same passage, he also refers to portions of the Continental Shelf on the Pacific Coast no wider than one mile as being part of the new land placed under Department of Interior jurisdiction (*Id.*)

In the 1952 annual report of the Secretary of the Interior, there was further evidence that Interior treated the submerged lands within the three-mile limit as part of the lands on the Continental Shelf reserved by Executive Order 9633 in 1945. In a clear reference to the fact that Executive Order 9633 had placed the submerged lands of the Continental Shelf under the jurisdiction and control of the Secretary of Interior for administrative purposes "pending the enactment of legislation in regard thereto," the 1952 annual report explains that the failure of Congress to enact legislation with respect to the oil and gas deposits on the Continental Shelf has inhibited action with respect to the lands won by the United States in the first *California, Louisiana,* and *Texas* cases. (Cal Op. Br. 45.) If Executive Order 9633 did not reserve those

lands as well as the lands beyond the three-mile limit "pending the enactment of legislation in regard thereto," the quotation from the 1952 annual report cited in California's opening brief would be bereft of intelligible meaning.

What does the United States have to say about this evidence of how the Department of Interior construed the 1945 executive order? The answer is, Absolutely nothing! As it does elsewhere in its brief, it just ignores those arguments it cannot answer. Yet the United States utilizes the doctrine of contemporaneous construction in an effort to support its interpretation of the 1949 proclamation enlarging the Channel Islands National Monument. (U.S. Br. 21-27.) This suggests that the United States may view the doctrine as one to be applied only in favor of the United States, but not when the doctrine supports the position advanced by another party against the United States. While there is no support in the decisions of this Court for such an interpretation of the doctrine, such an implicit assumption may explain the silence of the United States in the face of such an unfavorable interpretation of the 1945 executive order by the department charged with its enforcement.

2. The 1949 Proclamation Is Not Sufficiently Clear To Support a Repeal by Implication.

While the United States does not discuss any of the authority cited by California with respect to the cardinal principal of statutory construction that repeals by implication are disfavored (*see* Cal. Op. Br. 48-51), it ends its footnote of argument with this bald assertion:

> "Second, California acknowledges (Br. 49-51) that any reservation of the disputed lands by the 1945 order could be implicitly revoked *pro tanto* by the 1949 proclamation. Assuming *arguendo*

that it is necessary to reach this issue, we think the terms of the 1949 proclamation are certainly clear enough to constitute such revocation." (U.S. Br. 25-26 n. 14.)

In response to this assertion, California submits that it is by no means clear that the 1949 proclamation intended to add, or did in fact add, the submerged lands of the one-mile belt to the Channel Islands National Monument. The United States focuses on one of the numerous meanings of the word "area" cited in California's opening brief as "authoritatively" proving that the word may include submerged lands. (U.S. Br. 8.) This approach, of course, begs the question of whether the word "areas" in the 1949 proclamation was used in that special sense. The word "area" most usually refers to a surface rather than all the contents of a three-dimensional unit of space. (Cal. Op. Br. 14-17.)

The United States also asserts without support from the record that "areas" was " . . . the most commodious word that could have been used in this context to denote that everything within the boundaries, not merely 'certain rocks and islets,' was added to the monument." While "areas" could have been used to denote everything in the one-mile belt, neither the language of the proclamation nor its executive history will support the proposition that the word "areas" was used in that way.

The penultimate paragraph of Secretary Krug's draft of his letter transmitting the proposed proclamation to President Truman states that the purpose of the proclamation was to place under the control of the National Park Service "the islets, rocks, and waters within a distance of one nautical mile from Santa Barbara and Anacapa Islands." (Jt. App. 46, lines 19-23.) The final draft of the letter sent to the White House substituted the phrase "the

area within one nautical mile from the shoreline of Anacapa and Santa Barbara Islands" for the earlier reference to "islets, rocks, and waters." (Jt. App. 51, lines 20-22.) Thereafter the word "area" or "areas" was used in all the succeeding drafts of the 1949 proclamation. (Jt. App. 53-55, 67-68.) The reason for the substitution of terminology is wholly unexplained and left to inference. While the United States chooses to infer that "areas" was selected as the most "commodious" word to refer to everything in the one-mile belt, the stronger inference is that the word was used simply as a replacement for "islets, rocks, and waters" to the exclusion of the submerged lands beneath the waters.

This inference is reinforced by the fact that the documents comprising the executive history of the 1949 proclamation do not even once mention submerged lands as part of the proposed enlargement of the Channel Islands National Monument. (*See* Cal. Op. Br. 36-37.) The brief for the United States does not contain a single citation to the record where submerged lands were mentioned as part of the proposed enlargement. Even after the 1947 paramount rights decision, the only references in the executive history are to the islets, rocks and waters as distinct from the submerged lands lying beneath the waters. (Jt. App. 42, 46, 48, 49.) If, as the United States argues (U.S. Br. 25-26 n. 14), the 1949 proclamation so clearly added the submerged lands within the one-mile belt that 1945 executive order was partially revoked by implication, then one would expect at least one mention of the submerged lands somewhere in the executive history of the proclamation.

The absence of any reference of submerged lands in the documents comprising the executive history of the 1949 proclamation raises a compelling inference that the executive intent was to add a belt of waters without the

underlying submerged lands to the Channel Islands National Monument. Such an attempt would be impermissible under the Antiquities Act of 1906 (*see* Cal. Op. Br. 52-57), a point apparently conceded by the United States. (U.S. Br. 9 n. 3.) Yet it appears that this is precisely what the Executive Branch intended when it enlarged the monument in 1949. The United States totally misconstrues California's argument when it states on page 9 of its brief that " . . . California does not contend that the 1949 proclamation added merely surface waters to the Monument." Our opening brief states precisely the opposite in the second paragraph of page 52. Our point is that Congress has not authorized the reservation of waters alone as part of a national monument. The term "areas" must be narrowly construed to include only the islets and rocks within the one-mile belt if this Court is to avoid a construction of the 1949 proclamation which would invalidate it in its entirety. (*See* Cal. Op. Br. 52-57; *see also* 37-38.)

There can be little doubt that the National Park Service contemplated the enlargement of the monument with only the surface areas of the surrounding one-mile belt of ocean waters. The brief for the United States highlights this point very nicely. On page 15 of its brief, the United States quotes the head of the National Park Service's Section on National Park Wildlife as suggesting an extension of the monument's boundaries "to include *the surface of the adjacent ocean*" be considered. (Jt. App. 13.) (Emphasis added.) Therefore, the fact that the diagram attached to the 1949 proclamation contains acreage figures equal to the total surface area of the islands and surrounding waters is not "persuasive evidence" that the submerged lands beneath that part of that surface area were added to the monument in 1949. (*Cf.* U.S. Br. 9-10.)

The upshot of this argument is that, at the very least, there is an ambiguity as to whether submerged lands were part of the 1949 enlargement of the Channel Islands National Monument. In view of this ambiguity, it cannot be said that submerged lands were so clearly included in the 1949 proclamation as to effect a revocation of the 1949 executive order by implication. (Cal. Op. Br. 48-51.) Also under settled law, the ambiguity must be resolved against the United States since careful draftsmanship by its agents would have avoided this whole controversy. (*See* Cal. Op. Br. 37-38.) Since the submerged lands of the one-mile belt were not added to the monument in 1949 because of the failure to revoke Executive Order 9633, it necessarily follows that the waters of the one-mile belt could not have been added alone without violating the Antiquities Act. (Cal. Op. Br. 52-57.) The net result is that, as a matter of law, the 1949 proclamation is susceptible of only one possible remaining interpretation, that is, an enlargement which included the islets and rocks above high water and nothing else.

B. Contemporaneous Construction by the United States Does Not Support an Interpretation of the 1949 Proclamation To Include the Submerged Lands of the One-Mile Belt.

The force of the preceding argument is not undercut by any contemporaneous interpretation of the 1949 proclamation by either the United States or California. The United States cites the Court to a single memorandum by counsel for the National Park Service, written in 1949 and stating his opinion that "submerged areas" were "recently added to the Channel Islands National Monument." (U.S. Br. 21-22; Jt. App. 70.) Every other contemporaneous federal document cited in the brief for the United States adverts to the "waters" of the one-mile belt as part of the

1949 enlargement but pointedly omits any reference to submerged land as part of that same enlargement. (U.S. Br. 22, lines 16-18; 23, line 21; 26, line 10.) The United States also cites undated Park Service regulations which prohibit "digging in the bottom" and tampering with wrecks. (U.S. Br. 26.)

With only two post-enlargement documents which construe the 1949 proclamation to add submerged lands and three others which mention waters only, the United States is a bit disingenuous when it then concludes that "The federal government, acting through the Department of Interior, has not deviated from its position that since 1949 the Channel Islands National Monument includes all submerged lands and water areas within one mile of Santa Barbara and Anacapa Islands." (U.S. Br. 25; footnote omitted.)

A January 14, 1958 opinion rendered by the Field Solicitor of the Department of the Interior in San Francisco certainly deviated from this position when it stated that " . . . The Park Service no longer has authority to enforce its regulations in the water area within one nautical mile of the shore line of Anacapa and Santa Barbara Islands." (Jt. App. 88-89.) Moreover, the 1949 opinion of National Park Service Chief Counsel Jackson Price does not indicate that he had the benefit of the executive history compiled by the parties and now before this Court. (*See* Jt. App. 69-70.) The Price opinion also did not take Executive Order 9633 into account.

In any event, the sparse evidence of a "contemporaneous construction" is not controlling as to interpretation of the 1949 proclamation. This Court has never required deference to administrative constructions in all cases. On the contrary, it has consistently held that the courts, not administrative agencies or departments, have the ultimate

responsibility for interpretation of legislation (or, in this case, executive proclamations). In *Volkswagenwerk Aktiensellschaft v. FMC*, 390 U.S. 261, 272 (1968), the Court stated:

> "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' But the courts are the final authorities on issues of statutory construction and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia." (Citations omitted.) *Accord, Zuber v. Allen*, 369 U.S. 168, 192-93 (1969).

In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Supreme Court enunciated a standard for evaluating contemporaneous administrative constructions by which courts could weigh such constructions against other interpretational aids. The Court there reasoned:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronounce-*

ments, and all those factors which give it power to persuade, if lacking power to control." (*Id.* at 140; emphasis added.)

Since an administrative construction is only valuable as an *interpretation* of a statute, it is axiomatic that an interpretation contrary to what the statute is held to mean as a matter of law cannot pass the "validity of reasoning" test. The Supreme Court has held that a contemporaneous construction without an adequate basis in law has no weight. *See, e.g., Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 677-78 (1954); *Sanford v. Commissioner*, 308 U.S. 39, 52 (1939). A court cannot adopt an erroneous construction of a statute simply because the administrative agency ordinarily entitled to interpret the statute has interpreted that statute erroneously for a certain period of time. As the Supreme Court recognized in *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86 (1975), "Courts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.'" *Id.* at 95 (citations omitted). *Accord, Jewell Ridge Coal Corp. v. UMW*, 325 U.S. 161, 169 (1969). In a like manner, if the administrative construction is based on a long-continued oversight in construing the law, it is entitled to no weight. For example, in *Grand Trunk Western Ry. Co. v. United States*, 252 U.S. 112 (1920), the Supreme Court found that the Post Office's practice of paying the railroad the full rate for services did not overcome the statute's true intent that only 80% of the fees should be paid. The Court reasoned:

> "But here the practice long continued of paying the full rate instead of eighty percent thereof was not due to any construction of a statute which the department later sought to abandon, but to what is alleged to be a mistake of fact due perhaps to an oversight. To such a case the rule of long-continued construction has no application." *Id.* at 121.

Application of these rules to the instant case requires only a comparison of the reasoning behind California's interpretation of the 1949 proclamation with the interpretation proffered by the United States as "contemporaneous construction." California feels certain that its interpretation will withstand scrutiny under the "validity of reasoning" standard while the federal construction will not.

C. The Record Does Not Support the Federal Contention That California Agreed With Its Interpretation of the 1949 Proclamation in the Period Immediately Following Its Announcement.

The United States cites two documents as evidence that California recognized federal jurisdiction over the one-mile belt around Anacapa and Santa Barbara Islands in the months immediately following the issuance of the 1949 proclamation. (U.S. Br. 22-25.) A fair reading of the two documents should demonstrate that they are not evidence of that kind at all.

The first document in its entirety was as follows:

State of California
Department of Natural Resources
DIVISION OF FISH AND GAME
Ferry Building
San Francisco 11, California

July 15, 1949.

TO WHOM IT MAY CONCERN:

The National Park Service has just called to our attention the fact that Santa Barbara and Anacapa Islands, and the waters surrounding said islands to a distance of one nautical mile, comprise the Channel Islands National Monument.

The National Park Service also advises us that they will not permit any use of explosives for any purpose within the boundaries of this National Monument.

In the exercise of any permit previously issued by the California Fish and Game Commission to use explosives for seismic operations, or in the exercise of any permit which may be granted in the future, you will please be governed by this notice.

FISH AND GAME COMMISSION
BY
E.L. MACAULAY
Executive Officer

While this notice states the position of the National Park Service for the information of California seismic operation permittees, nothing in the document purports to endorse the federal position. A reasonable interpretation of the notice is that Mr. Macaulay was simply passing along information received from the National Park Service to California permittees so that they will not run the risk of trouble with federal authorities in the vicinity of the Channel Islands National Monument.

The second document is a letter requesting information about the National Park Service's postition with respect to commercial fishing and kelp harvesting in the waters around Anacapa Island. (U.S. Br. 24; Jt. App. 76.) This letter is scarcely an expression of California acquiescence to federal jurisdiction over the Anacapa Island kelp beds. It asks a question, but it expresses no position whatsoever on behalf of the State of California.

It would not have been surprising if some California official had recognized federal jurisdiction over the one-mile belt between 1949 and 1953. After all, it was during that period that the federal government had "paramount rights" and "full dominion" over the entire three-mile territorial sea. Recognition of federal jurisdiction over the submerged lands around Anacapa and Santa Barbara Islands would indicate respect for this Court's first decision in *United States v. California* rather than agreement with any federal interpretation of the 1949 proclamation. However, neither document cited by the United States mentioned submerged lands, and neither document is susceptible of the overreading given it in the brief for the United States.

II

THE UNITED STATES DOES NOT HAVE A RIGHT TO THE ONE-MILE BELT BY VIRTUE OF THE CLAIM OF RIGHT EXCEPTION TO THE SUBMERGED LANDS ACT

In its opening brief, California demonstrated that Congress intended to relinquish to California *all* federal jurisdiction and ownership rights within the three-mile territorial sea when it passed the Submerged Lands Act in 1953, subject only to the reservations and exceptions set forth in the Act. (Cal. Op. Br. 58-61, 82-84.) Nowhere in its brief does the United States dispute that such was the intent of Congress. Thus, the one-mile belt around the two principal islands of the Channel Islands National Monument was returned to California by virtue of the Submerged Lands Act unless the federal government can show that this one-mile belt was somehow excepted from the operation of the Act.

In an attempt to that end, the United States grounds its claim to jurisdiction over the one-mile belt around Anacapa and Santa Barbara Islands squarely on the claim of right exception set forth in Section 5 of the Submerged Lands Act, 67 Stat. 32, 43 U.S.C. § 1313. (U.S. Br. 28.) In its opening brief, California cited authority for the proposition that the United States has the burden of proving that its claim falls within the Section 5 exception to the Submerged Lands Act. (Cal. Op. Br. 60-61.) The United States apparently agrees that it must shoulder the burden of proof since its brief nowhere challenges this proposition or the authority cited by California.

The United States makes a further telling concession when it states in its brief:

> "We further agree that the claim of right exception does not preserve to the United States any claim resting solely on the doctrine of paramount right [sic] announced by this Court in *California I* (Cal. Br. 76)." (U.S. Br. 29.)

The Senate Report on the bill which ultimately became the Submerged Lands Act virtually compels this concession. The report makes it clear that the claims of right excepted by Section 5 do not include "any claim resting solely upon the doctrine of 'paramount rights' enunciated by the Supreme Court with respect to the Federal Government's status in the areas beyond inland waters and mean low tide." S. Rep. No. 133, 83d Cong., 1st Sess. 20 (1953).

California submits that this concession by the United States is fatal because its claim to the one-mile belt is a "claim resting solely upon the doctrine of 'paramount rights' enunciated by the Supreme Court with respect to the Federal Government's status in the areas beyond inland waters and mean low tide." But for the paramount rights doctrine announced in the 1947 *United States v. California* decision, the United States had no claim to ownership or control of the submerged lands of the one-mile belt, the natural resources beneath them, or the waters above them. Section 2 of the Antiquities Act of 1906 clearly specifies that only "lands owned or controlled by the Government of the United States" may be reserved for national monument purposes. 34 Stat. 225, 16 U.S.C. § 431. In 1949, the United States could be said to "own or control" the submerged lands of the one-mile belt around the two principal islands of the Channel Islands National Monument only because this Court had announced in 1947 that the United States was possessed of "paramount rights in, and full dominion and power over, the lands, minerals and other things" underlying the

Pacific Ocean seaward of the ordinary low-water mark on the coast of California to a distance of three nautical miles. *United States v. California*, 332 U.S. 804, 805 (1947). The Chief Counsel for the National Park Service expressly acknowledged in a May 31, 1949 memorandum that national monument jurisdiction over the belt was based upon the paramount rights doctrine enunciated in the first *United States v. California* decision. (Jt. App. 69-70, *esp.* 70, lines 9-11.) There could not be a clearer admission that the purported federal claim of right to the one-mile belt around Anacapa and Santa Barbara Islands is unmistakably a "claim resting solely on the doctrine of 'paramount rights'." In light of the Senate Report and the concession by the United States, it follows as a matter of law that the purported federal claim is not within the class of claims excepted from the operation of the Submerged Lands Act by the claim of right language in Section 5.

The United States argues that its claim to the one-mile belt is not a claim resting solely on the paramount rights doctrine. (U.S. Br. 29.) The gist of the argument is that the 1949 reservation of the one-mile belt as part of the Channel Islands National Monument is *ipso facto* a "claim of right" because it is "a statement by the President of the United States officially proclaiming that the areas are reserved 'under and by virtue of the authority vested in' him by a public law passed for just such a purpose by the Congress (Jt. App. 67)." (U.S. Br. 29.) This contention is utterly without substance.

The defect of this contention may be demonstrated by examining the nature of the federal claim to the submerged lands and waters of the one-mile belt before and after the 1949 Presidential Proclamation enlarging the Channel Islands National Monument. After the first *United States v. California* decision and prior to the 1949 proclamation,

there can be no question that the federal claim of right to the one-mile belt surrounding Anacapa and Santa Barbara Islands was a claim resting solely on the paramount rights doctrine enunciated in the 1947 decision. After the enlargement of the monument on February 9, 1949, nothing happened to alter the basis of the federal claim unless the proclamation somehow transmuted the claim resting solely on the paramount rights doctrine into a claim of a different type. The reservation did not have any such magical effect.

A reservation for national monument purposes is not a claim of right in and of itself. At most, it is an expression of a belief on the part of the President that the federal government owns or controls the lands being reserved for national monument purposes. The claim of right is the basis upon which the United States claims a right of ownership or to possession of the lands being reserved. The reservation operates only to change the category under which the Department of Interior holds the lands for administrative purposes. For example, if a national monument is created out of public domain lands, the lands reserved for national monument purposes are no longer subject to entry and sale and are set apart for the special purposes delineated in the Antiquities Act of 1906, 16 U.S.C. § 431. In *Wilcox v. Jackson*, 13 Pet. 498, 513 (1839), it was stated in regard to a military reservation that " . . . whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment, the land thus appropriated becomes severed from the mass of public lands . . . ." *United States v. Celestine*, 215 U.S. 278, 285 (1909), contains the following definition of a "reservation":

> " . . . The word is used in the land law to describe any body of land, large or small, which

> Congress has reserved for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide, and when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress."

While the President as well as Congress may now create a reservation under appropriate circumstances, the principle remains unchanged. The effect of a reservation is to shift the land from one administrative category to another. If the federal government does not own the lands placed in a reservation, the reservation does not improve the quality of federal title. The United States' claim of right remains the same as before the reservation.

The United States contends that a "claim of right" under Section 5 of the Submerged Lands Act does not have to be a claim of title or even a claim of a right to possession. (U.S. Br. 29-32.) It asserts that there is no support for California's position that a claim of right must be a claim of ownership or to possession. (*Id.* at 29-30.) Yet immediately after making this incorrect assertion, the United States quotes a portion of the legislative history of the Submerged Lands Act in which Senator Cordon explains to Senator Kuchel that a claim of right " . . . means that the United States is in actual occupancy and *claims that it has a right to occupancy.*" (U.S. Br. 30.) (Emphasis added.) A claim of a right to occupancy means nothing unless it means a claim of ownership (title) or to possession. Indeed, on page 31 of its brief, the United States quotes Senator Cordon again stating as follows:

> "The bill is a conveyance. Unless we except from the conveyance a tract of ground, *the title of which is in dispute,* and unless we except that we end the dispute, but we end it adversely to the United States." (Emphasis added by the United States.)

This language clearly demonstrates that a Section 5 claim of right must be a claim of title and not merely a reservation of federal lands standing apart from the underlying federal claim to ownership or control. But it also proves much more. The above quotation indicates that the claim of right exception was intended to preserve federal claims to tracts of land where *title was in dispute* as of the date of passage of the Submerged Lands Act. Title to the submerged lands underlying the one-mile belt around Anacapa and Santa Barbara Islands was not in dispute as of the date of the enactment of the Submerged Lands Act. Federal jurisdiction over these lands rested solely upon the paramount rights doctrine. As discussed above, Congress clearly manifested its intention that any claim resting solely on the paramount rights doctrine not be excepted from the operation of the Submerged Lands Act.

Finally, it should be observed that the United States did not respond at all in its brief to California's argument that the Submerged Lands Act revoked the 1949 proclamation reserving the one-mile belt for national monument purposes. (Cal. Op. Br. 82-84.) The failure to answer this argument should be treated as a concession of this point by the United States.

III

THE UNITED STATES' PROPOSED MODIFICATION OF ITS DECREE WOULD NOT RESOLVE THE THREE-MILE BOUNDARY ISSUE SATISFACTORILY, NOR WOULD IT RECOGNIZE CALIFORNIA'S OWNERSHIP OF THE TIDELANDS

In the third section of its opening brief, California pointed out that the decree proposed by the United States measured the three-mile boundary between federal and state submerged lands only from the coastlines of Anacapa and Santa Barbara Islands without taking into account other islands (rocks above mean high water) and low-tide elevations which should also be counted as basepoints for measurement of the boundary. (Cal. Op. Br. 85-87.) In footnote 17 of its brief, the United States admits that the low-tide elevations and other islands should be taken into account and that it overlooked them in its proposed decree. (U.S. Br. 32-33.) Despite that admission, however, the United States proposes that the Third Supplemental Decree omit specific reference to these other islands and low-tide elevations and merely state in general terms that the outer boundary of California's submerged lands is "three nautical miles from the coastline of California." (*Id.*)

The purpose of this exercise of continuing jurisdiction reserved in paragraph 13 of the 1966 supplemental decree, *United States v. California*, 382 U.S. 448, 453 (1966), is to give specific content to the general phraseology of the Submerged Lands Act and the first supplemental decree in areas where the parties have been unable to agree as to any portion of the boundary line. The phrase "three nautical miles from the coastline of California" proposed by the United States does not resolve the particular

problem posed here. Up until its latest brief, the United States did not count the other islands and the low-tide elevations in the vicinity of Anacapa and Santa Barbara Islands for purposes of locating the three-mile boundary. California believes that the other islands and low-tide elevations should be specifically mentioned in the decree with nothing left to inference. Otherwise the decree leaves California in the same position that it was in prior to seeking this decree — with general language that has to be further defined in order to establish that the other islands and low-tide elevations are to be taken into account.

California believes that the United States' objection to language referring to the territorial sea is well taken because the breadth of the territorial sea may change. Therefore California requests that the following language be substituted as paragraph 1 of its proposed supplemental decree:

> "1. As against the United States, the State of California has title to and is the owner of all tidelands (defined as the shore of all islands between the line of mean high water and the line of mean lower low water and the portions of all low-tide elevations above the line of mean lower low water) surrounding the islands within the Channel Islands National Monument, established by Presidential Proclamation No. 2281, 52 Stat. 1541 (April 26, 1938) and extended by Presidential Proclamation No. 2825, 63 Stat. 1258 (February 9, 1949), and all tidelands situated on low-tide elevations within three nautical miles of the line of mean lower low water on any of the foregoing islands. As against the United States, the State of California also has title to and is the owner of all submerged lands and natural

resources (as the latter term of defined in subsection (e) of 43 U.S.C. § 1301) between the line of mean lower low water on all islands within the Channel Islands National Momument and on all low-tide elevations located within three geographical miles of any of those islands, and a second line located three geographical miles seaward of the foregoing line of mean lower low water.

"With respect to the foregoing land and natural resources, California's rights include the right and power to manage, administer, lease, develop and use these lands and natural resources all in accordance with applicable State law."

It should again be noted that the decree proposed by the United States does not recognize California's ownership of the tidelands in the vicinity of the Channel Islands National Monument except by indirection. Any decree issued by this Court should affirmatively adjudge California to have title to and to be the owner of these tidelands as against the United States.

Lastly, these particular criticisms of the United States' proposed decree should not obscure California's basic objection that the United States' decree fails to recognize California's rights to the submerged lands and natural resources within the one-mile belt around Anacapa and Santa Barbara Islands.

CONCLUSION

Based on the foregoing argument, California urges this Court to enter a third supplemental decree in the form proposed in its petition with the slight modifications set forth in Section III of this brief.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1977

No. 5, Original

Supreme Court, U. S.
FILED
DEC 27 1977
MICHAEL RODAK, JR., CLERK

UNITED STATES OF AMERICA, *Plaintiff,*

v.

STATE OF CALIFORNIA, *Defendant.*

PETITION FOR THE ENTRY OF A FOURTH SUPPLEMENTAL DECREE, REQUEST FOR APPOINTMENT OF A SPECIAL MASTER, PROPOSED FOURTH SUPPLEMENTAL DECREE, AND MEMORANDUM RELATIVE TO PROPOSED FOURTH SUPPLEMENTAL DECREE

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IN THE

Supreme Court of the United States

October Term, 1977

No. 5, Original

UNITED STATES OF AMERICA, *Plaintiff,*

v.

STATE OF CALIFORNIA, *Defendant.*

PETITION FOR THE ENTRY OF A FOURTH SUPPLEMENTAL DECREE AND REQUEST FOR APPOINTMENT OF A SPECIAL MASTER

The State of California respectfully petitions this Court to enter in this cause a supplemental decree in the form submitted herewith. California further requests that a Special Master be appointed to hold hearings and to prepare a report and recommendations with respect to the factual and legal issues involved.

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By _____

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DATED: December 19, 1977.

IN THE

Supreme Court of the United States

October Term, 1977

No. 5, Original

UNITED STATES OF AMERICA, *Plaintiff,*

v.

STATE OF CALIFORNIA, *Defendant.*

PROPOSED FOURTH SUPPLEMENTAL DECREE

For the purpose of identifying with greater particularity parts of the boundary line, as defined by the Supplemental Decree of January 31, 1966, 382 U.S. 448, between the submerged lands of the United States and the submerged lands of the State of California, it is ORDERED, ADJUDGED AND DECREED that this Court's Supplemental Decrees of January 31, 1966, and June 13, 1977, be, and the same are hereby, further supplemented as follows:

1. The inland waters of the Port of San Pedro include those waters enclosed by a straight line from the eastern end of the Long Beach breakwater (NOS Chart 18749, 33° 43′ 23″ N, 118° 08′ 10″ W) to the seaward end of the east jetty of Anaheim Bay (NOS Chart 18749, 33° 43′ 36″ N, 118° 05′ 57″ W).

2. The inland waters of San Diego Bay are those enclosed by a straight line from the seaward end of Point Loma (NOS Chart 18772, 32° 39′ 46″ N, 117° 14′ 29″ W) to the point at which the line of mean lower low water intersects with the southern seaward end of the entire Zuniga jetty (NOS Chart 18772, 32° 40′ 00.5″ N, 117° 13′ 40″ W).

3. The mean lower low water line along each of the following structures is part of the coastline of California for purposes of establishing the Federal-State boundary line under the Submerged Lands Act:

a. The Sharp Beach pier (NOS Chart 18685, 37° 38′ 00″ N, 122° 29′ 41″ W);

b. The Morro Strand pier (NOS Chart 18703, 35° 24′ 38.4″ N, 120° 52′ 31.9″ W);

c. The Port Orford pier (NOS Chart 18721, 34° 28′ 09.6″ N, 120° 13′ 38.8″ W);

d. The Ellwood pier (NOS Chart 18721, 34° 25′ 39″ N, 119° 55′ 20″ W);

e. The Santa Barbara Biltmore Hotel pier (NOS Chart 18725, 34° 24′ 59.4″ N, 119° 38′ 30″ W);

f. The Carpinteria pier (NOS Chart 18725, 34° 23′ 06″ N, 119° 30′ 4.6″ W);

g. The Punta Gorda causeway and Rincon Island (NOS Chart 18725, 34° 20′ 48.1″ N, 119° 26′ 39″ W);

h. The Venice pier (NOS Chart 18744, 33° 59′ 06″ N, 118° 28′ 35″ W);

i. The El Segundo pier (NOS Chart 18744, 33° 54′ 36″ N, 118° 25′ 54″ W);

j. The Manhattan Beach pier (NOS Chart 18744, 33° 53′ 00″ N, 118° 24′ 48.2″ W);

k. The Hermosa Beach pier (NOS Chart 18744, 33° 51′ 40.2″ N, 118° 24′ 16.9″ W);

l. The Huntington Beach pier (NOS Chart 18740, 33° 09′ 14″ N, 118° 00′ 21″ W);

m. The Newport Beach pier (C&GS Chart 5108, 33° 36′ 22.0″ N, 117° 55′ 49.6″ W);

n. The Balboa Beach pier (C&GS Chart 5108, 33° 35′ 54.4″ N, 117° 54′ 01.1″ W);

o. The Oceanside pier (NOS Chart 18740, 33° 11′ 29.4″ N, 117° 23′ 18″ W);

p. The Ocean Beach pier (C&GS Chart 5108, 32° 44′ 58.5″ N, 117° 15′ 30.5″ W); and

q. The Imperial Beach pier (NOS Chart 18772, 32° 34′ 46.6″ N, 117° 08′ 08.0″ W).

4. Each of the closing lines, piers, and artificial structures delineated in the foregoing paragraphs is part of the coastline of California. The foregoing is without prejudice to the right of either party to assert or deny that other closing lines, piers or artificial structures are part of the coastline of California for purposes of establishing the Federal-State boundary line under the Submerged Lands Act.

5. The Court retains jurisdiction to entertain further proceedings, enter such orders, and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree or to effectuate the rights of the parties in the premises.

IN THE

Supreme Court of the United States

October Term, 1977

No. 5, Original

UNITED STATES OF AMERICA. *Plaintiff.*

v.

STATE OF CALIFORNIA. *Defendant.*

MEMORANDUM RELATIVE TO PROPOSED FOURTH SUPPLEMENTAL DECREE

In 1945, the United States initiated this action against the State of California by the filing of a complaint in the original jurisdiction conferred by Article III, Section 2, Clause 2 of the United States Constitution. In the supplemental decrees of January 31, 1966, and June 13, 1977, this Court has retained jurisdiction to entertain such further proceedings, to enter such orders and to issue such writs as were deemed necessary or advisable to give

proper force and effect to these decrees or to effectuate the rights of the parties in the premises.* *United States v. California,* 382 U.S. 448, 453 (1966) (paragraph 14); *United States v. California,* U.S. , , 53 L.Ed.2d 94, 95, 97 S.Ct. 2915, 2916 (1977) (paragraph 3). Referring to the boundary line between the submerged lands of the United States and the submerged lands of the State of California, paragraph 13 of the 1966 decree provided:

> "... As to any portion of such boundary line or of any areas claimed to have been reserved under § 5 of the Submerged Lands Act as to which the parties may have been unable to agree, either party may apply to the Court at any time for the entry of a further supplemental decree."

In urging the entry of the proposed fourth supplemental decree submitted with this petition, the State of California invokes the jurisdiction reserved by this Court in the 1966 and 1977 supplemental decrees with particular reference to the language quoted immediately above. The parties have been unable to agree as to the location of those portions of the boundary line affected by the closing lines of inland waters, the piers and the one other artificial

*The parties are currently seeking the entry of a third supplemental decree delineating their respective rights within one nautical mile of the shorelines of Anacapa and Santa Barbara Islands off the California coast. The parties have stipulated that there are no factual issues which require the appointment of a Special Master and have already filed a Joint Appendix and opposing briefs. At this time, the parties are awaiting an order directing the matter to be calendared for oral argument.

The present petition for entry of a fourth supplemental decree raises issues which are entirely separate from those raised in the pending cross-petitions for a third supplemental decree. Unlike the pending cross-petitions, this petition presents factual issues which require appointment of a Special Master.

structure listed in the proposed supplemental decree. California contends that these closing lines, piers and the other artificial structure are part of California's coastline for purposes of identifying additional parts of the boundary line between the submerged lands of the United States and the submerged lands of the State of California. The United States refuses to recognize that these closing lines and features constitute any part of California's coastline for this purpose.

A. The Port of San Pedro Closing Line

The first supplemental decree entered by this Court in 1966 did not completely identify the limits of the inland waters at the eastern end of the Port of San Pedro. Paragraph 7 of the 1966 supplemental decree stated:

> "7. The inland waters of the Port of San Pedro are those enclosed by the breakwater and by straight lines across openings in the breakwater; *but the limits of the port, east of the eastern end of the breakwater, are not determined by this decree." United States v. California,* 382 U.S. 448, 451 (1966). (Emphasis added.)

In seeking a fourth supplemental decree, California seeks a determination of the limit of the inland waters of the Port of San Pedro east of the eastern end of the breakwater. California proposes that a closing line be drawn from the eastern end of the Long Beach breakwater to the seaward end of the east jetty of Anaheim Bay. (*See* Figs. 1 & 2.) The United States takes the position that the closing line should be drawn from the eastern end of the Long Beach breakwater to the Alamitos Bay jetty also shown on Figures 1 and 2. A total of 63 acres of submerged land is involved in dispute at this location, and this acreage is situated in an area of proven oil reserves.

B. The San Diego Bay Closing Line

In the second supplemental decree entered by this Court on June 13, 1977, this Court adjudged that the Zuñiga jetty at the entrance to San Diego Bay was part of the coastline of California for purposes of establishing the federal-state boundary line under the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§ 1301-1315. *United States v. California,* U.S. , 53 L.Ed.2d 94, 95, 97 S.Ct. 2915, 2916 (1977) (paragraph 2). But neither the 1977 supplemental decree nor any previous decree of this Court has adjudicated the closing line of San Diego Bay. California contends that the closing line of San Diego Bay should be a straight line connecting its two natural entrance points: Point Loma and the seaward end of Zuñiga jetty. (*See* Fig. 3.) The United States contends that the closing line should be drawn from Point Loma to a point on the Zuñiga jetty where the closing line would have no effect on the federal-state boundary. Twelve (12) acres are in dispute at this location, and it is not known whether the acreage involved has oil potential.

C. The Piers and the Punta Gorda Causeway and Island

In addition to seeking a judicial decree establishing the proper closing lines for the Port of San Pedro and San Diego Bay, this petition also seeks an adjudication that sixteen (16) piers along the California coast (Figs. 4-8, 10-19) and the Punta Gorda causeway and island (Fig. 9) are part of the California coastline for purposes of identifying the federal-state boundary immediately in front of each of these structures. With respect to all of these structures, there are approximately 2,854 acres in dispute. Most of this acreage is situated over known pools of oil presently under development.

Under this Court's definition of "coast line" set forth in paragraph 2 of the 1966 supplemental decree, the piers and the Punta Gorda causeway and island constitute modifications of the coastline by "artificial means" and may also qualify as "harbor works." *United States v. California,* 382 U.S. 448, 449 (1966). Furthermore, in *United States v. Louisiana,* 394 U.S. 11, 37 n. 42 (1969), this Court specifically noted that the *travaux preparatoires* of the Convention on the Territorial Sea and the Contiguous Zone, T.I.A.S. No. 5639, reflected an understanding that piers as well as jetties were to be treated as part of the baseline for delimiting the breadth of the territorial sea. Since the Convention has been adopted for purposes of interpreting the Submerged Lands Act (*United States v. California,* 381 U.S. 139, 165 (1965); *United States v. Louisiana, supra,* 394 U.S. at 21), the International Law Commission's treatment of piers as part of the baseline of the territorial sea should be persuasive toward a finding that piers are and should be treated as part of the coastline under the Submerged Lands Act of 1953. California also contends that the Punta Gorda causeway and island should be treated as an artificial modification of the coastline or as a "harbor work" in the same manner as jetties and piers.

Present federal opposition to the treatment of California's piers as part of its coastline conflicts with a published Department of State position recognizing piers as part of the coastline. A 1965 Department of State publication contained a diagram which clearly identified a pier on the open coast and treated that pier as a basepoint for measurement of the breadth of the territorial sea. U.S. Department of State, *Sovereignty of the Sea* (Geographic Bull. No. 3, April 1965), at 29. A copy of that diagram is reproduced as Figure 20 in the appendix to this petition.

Finally, there will be no inequity to the United States if California is permitted to count 16 piers and one causeway as part of its coastline. In *United States v. California, supra,* 381 U.S. at 177, this Court observed that:

> "... Arguments based on the inequity to the United States of allowing California to effect changes in the boundary between federal and state submerged lands by making future artificial changes in the coastline are met, as the Special Master pointed out, by the ability of the United States to protect itself through its power over navigable waters."

The United States still possesses this power to regulate artificial changes which would affect the federal-state boundary in offshore areas. 33 U.S.C. § 403 provides that it is unlawful to build or commence the building of a pier or other structure in any water of the United States outside established harbor lines "except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army."

D. The Need for Appointment of a Special Master to Report on Disputed Questions of Fact

California submits that this petition raises questions of fact appropriate for reference to a Special Master. It is California's estimate that presentation of evidence on these factual issues should require approximately seven days of trial time.

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JOHN BRISCOE
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Attorneys for Petitioner.

APPENDIX

Figure 1
CLOSING LINE OF PORT OF SAN PEDRO
(EASTERN END ONLY)

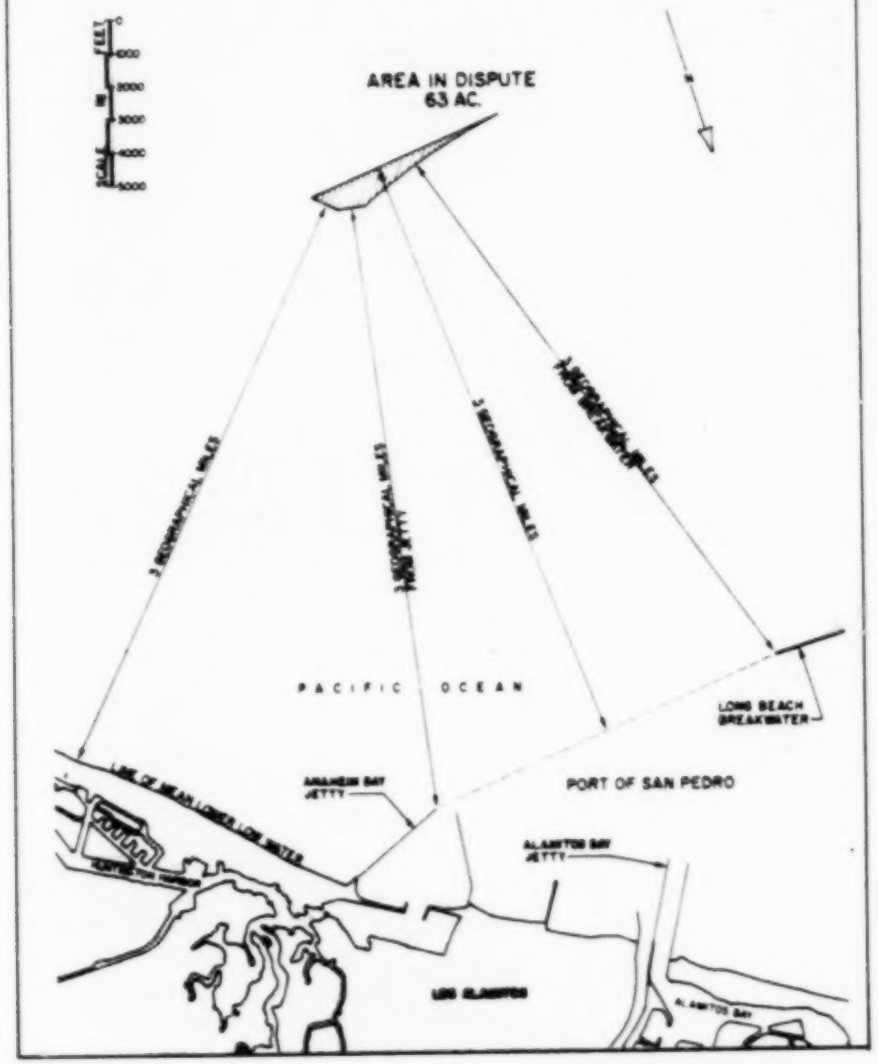


Figure 1a
CLOSING LINE OF PORT OF SAN PEDRO
(ENTIRE PORT)

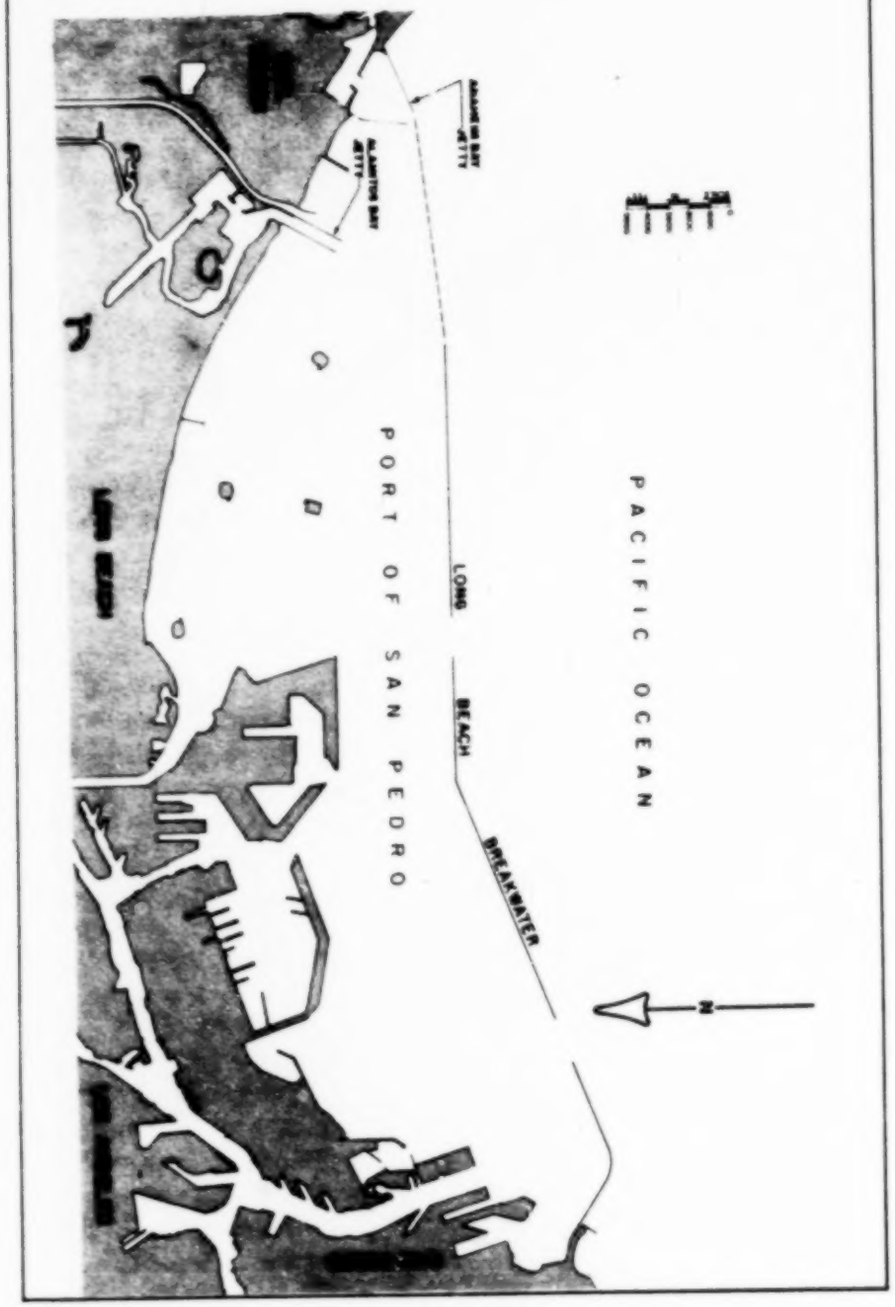


Figure 2
CLOSING LINE OF SAN DIEGO BAY

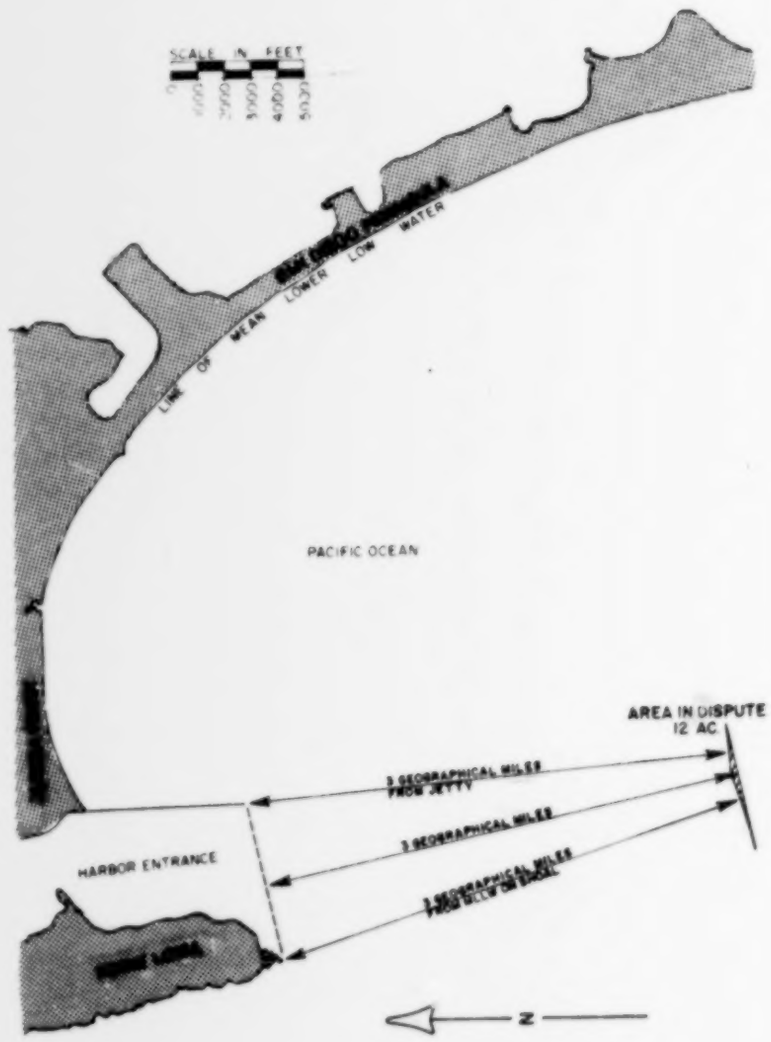


Figure 3
THE SHARP BEACH PIER

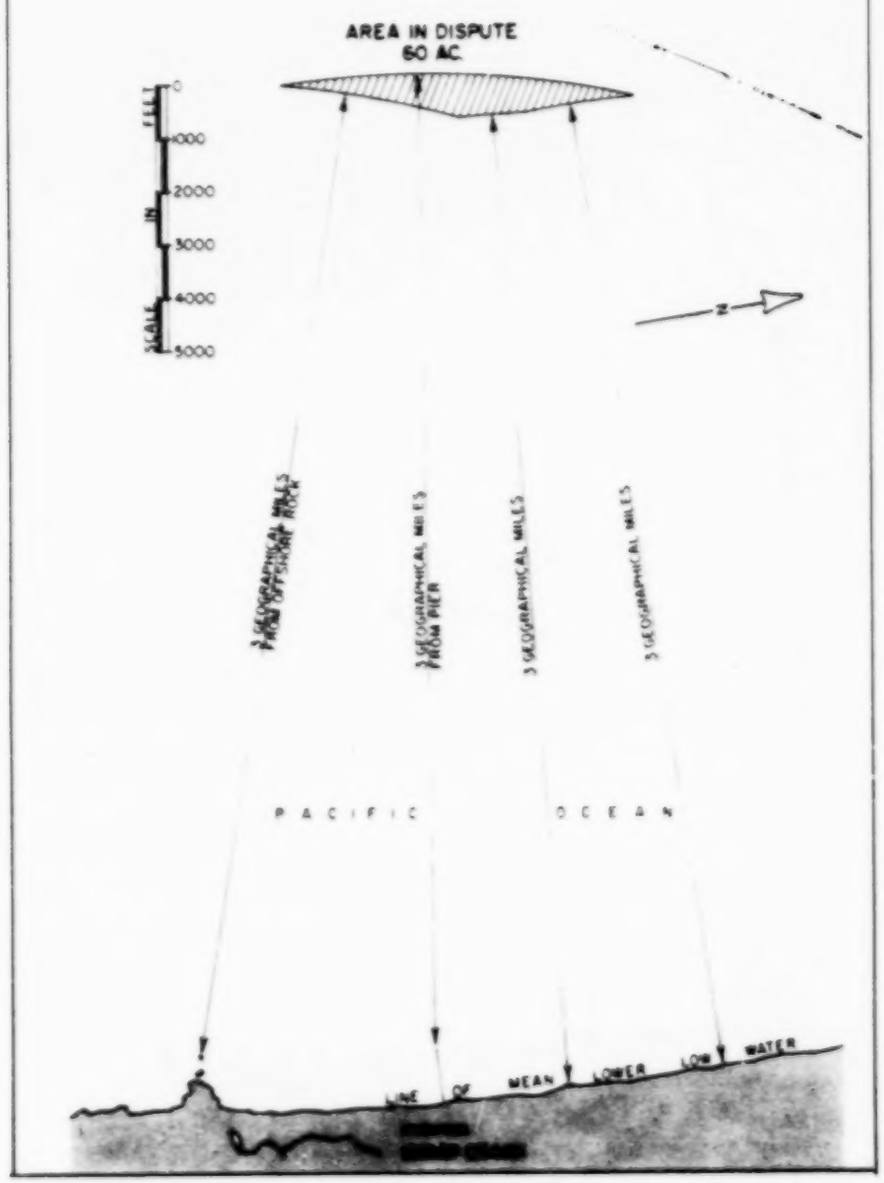


Figure 4
MORRO STRAND PIER

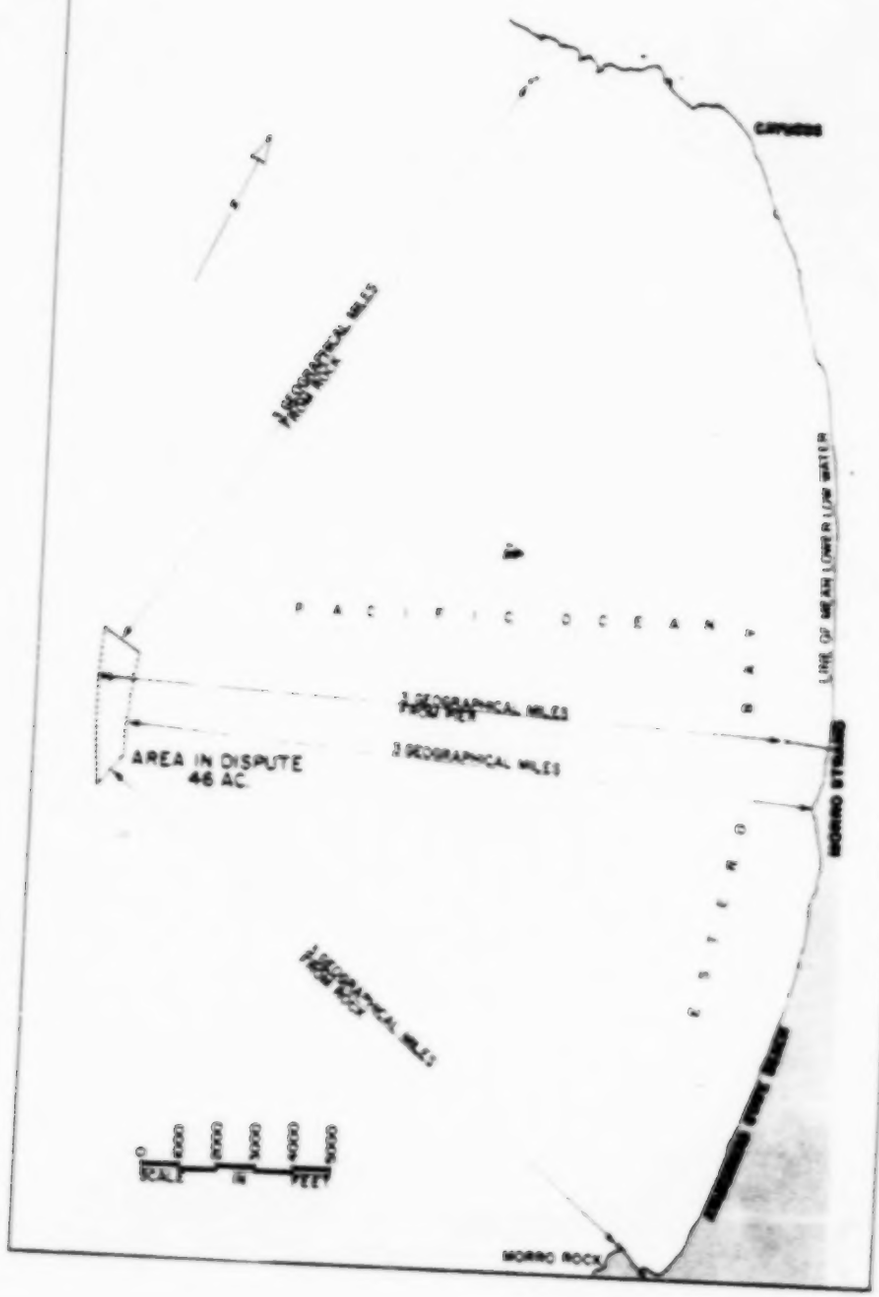


Figure 5
THE PORT ORFORD PIER

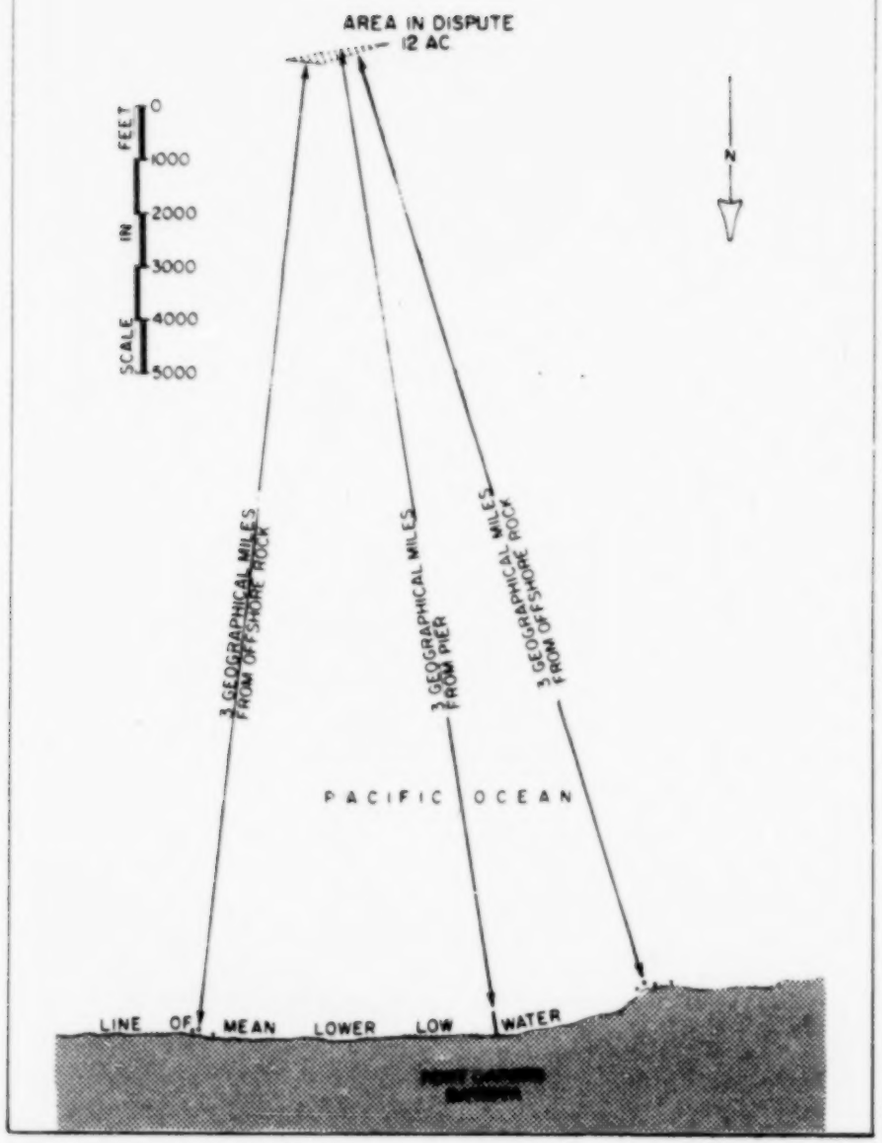


Figure 6
THE ELLWOOD PIER

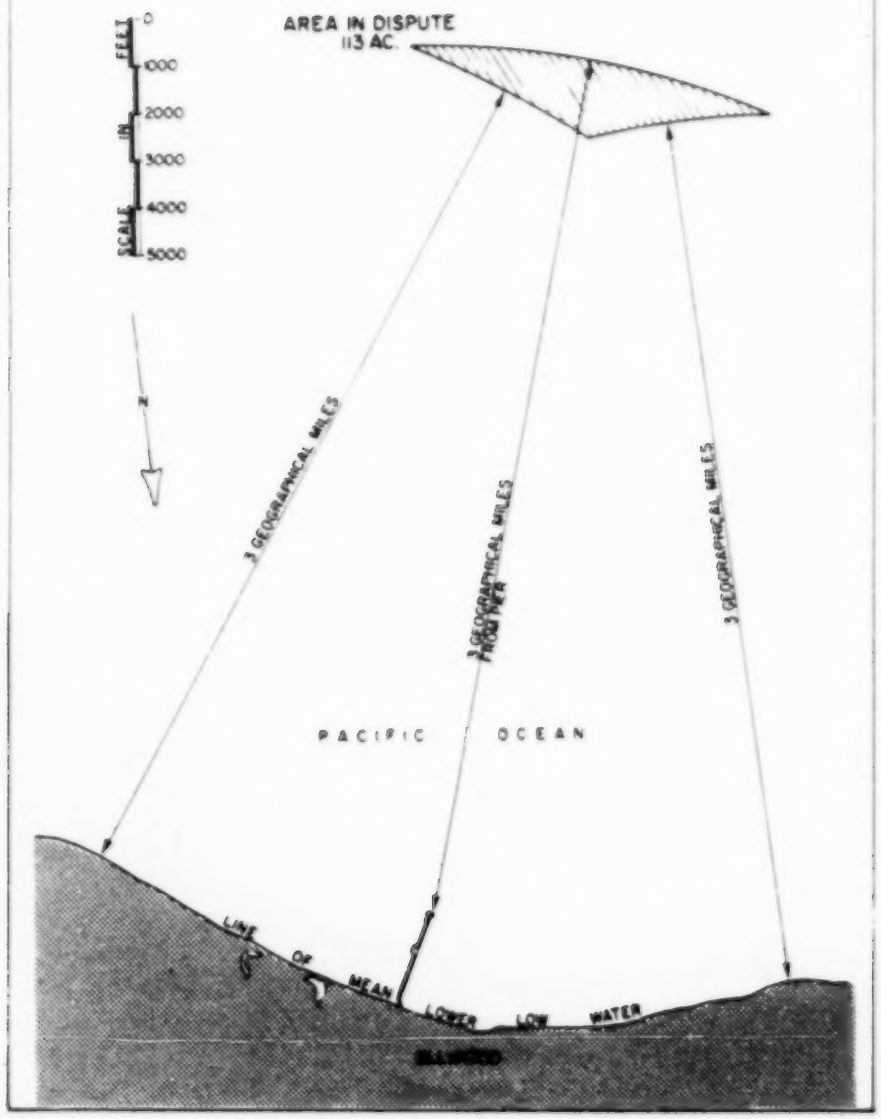


Figure 7
THE SANTA BARBARA BILTMORE HOTEL PIER

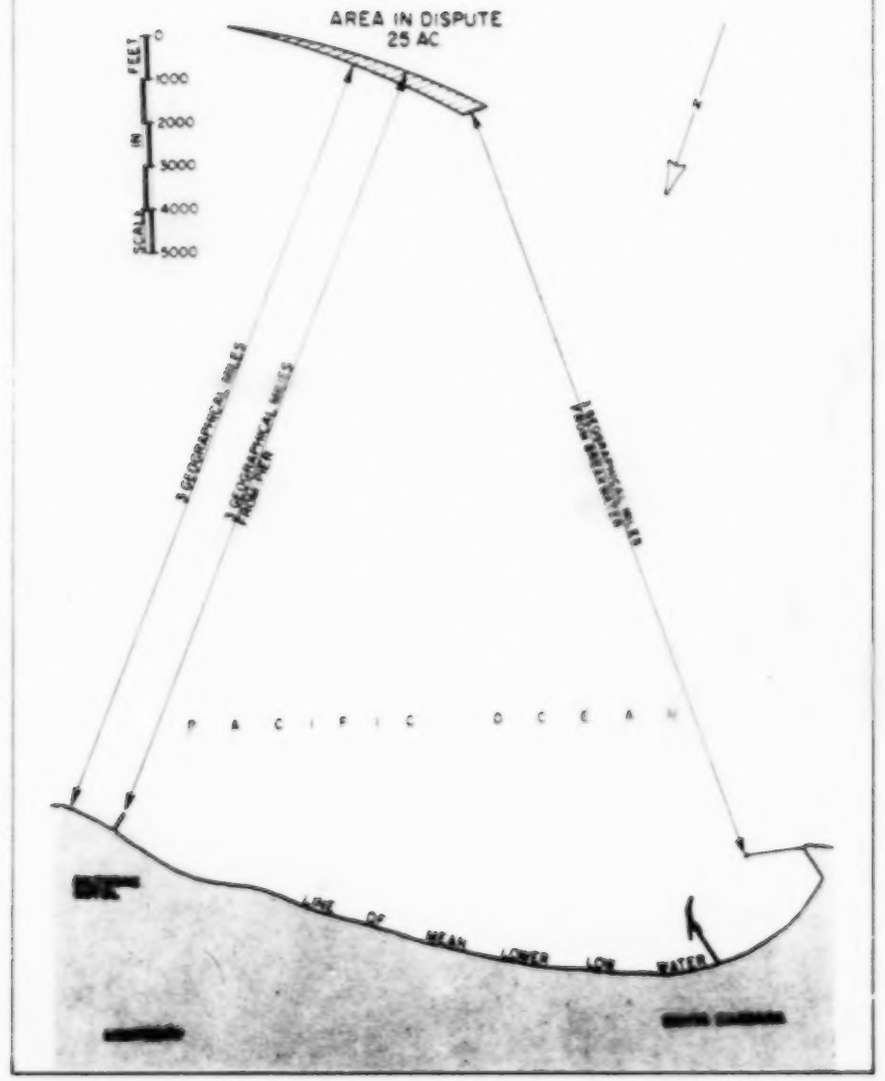


Figure 8
THE CARPINTERIA PIER

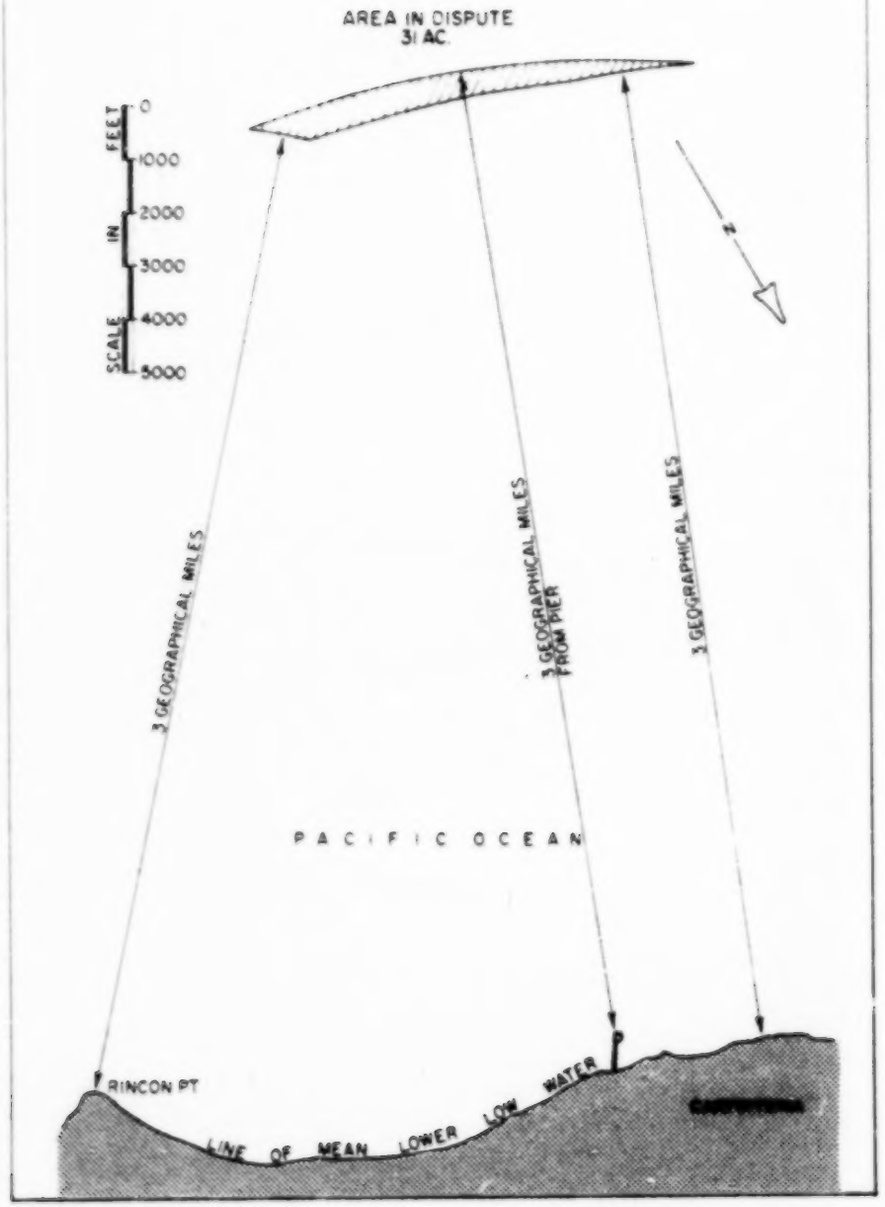


Figure 9
THE PUNTA GORDA CAUSEWAY
AND RINCON ISLAND

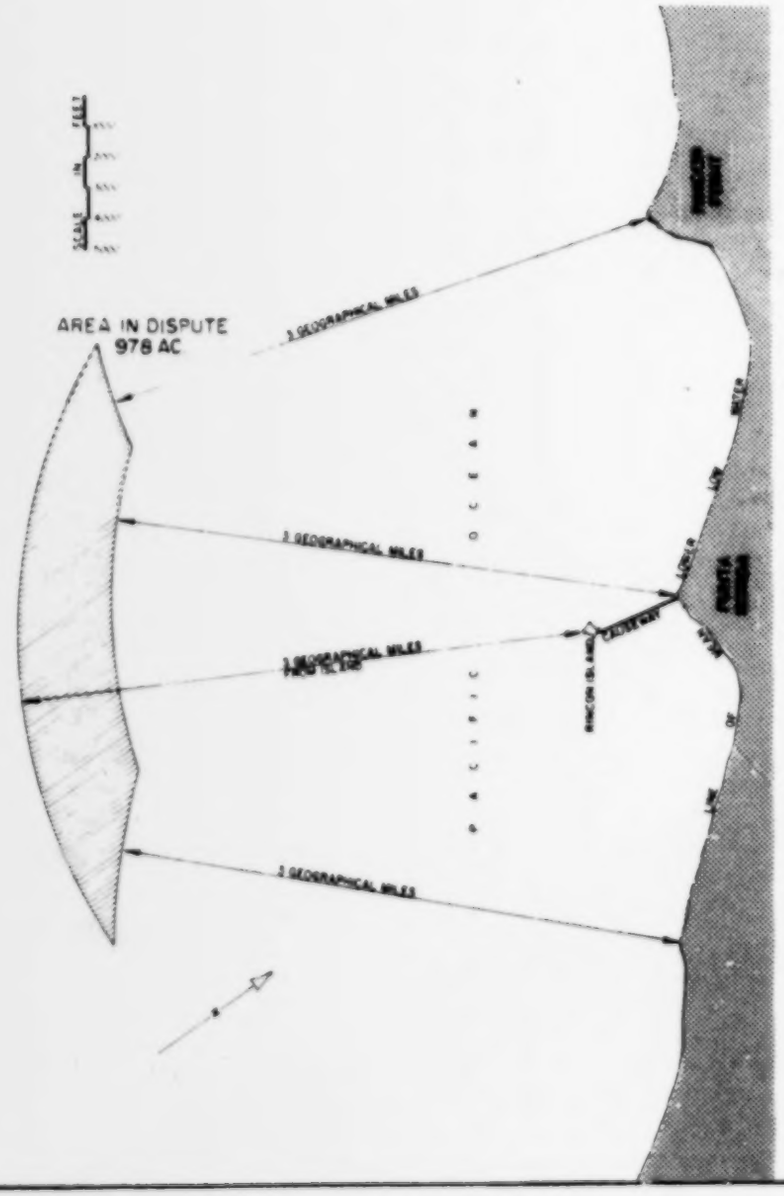


Figure 10
THE VENICE PIER

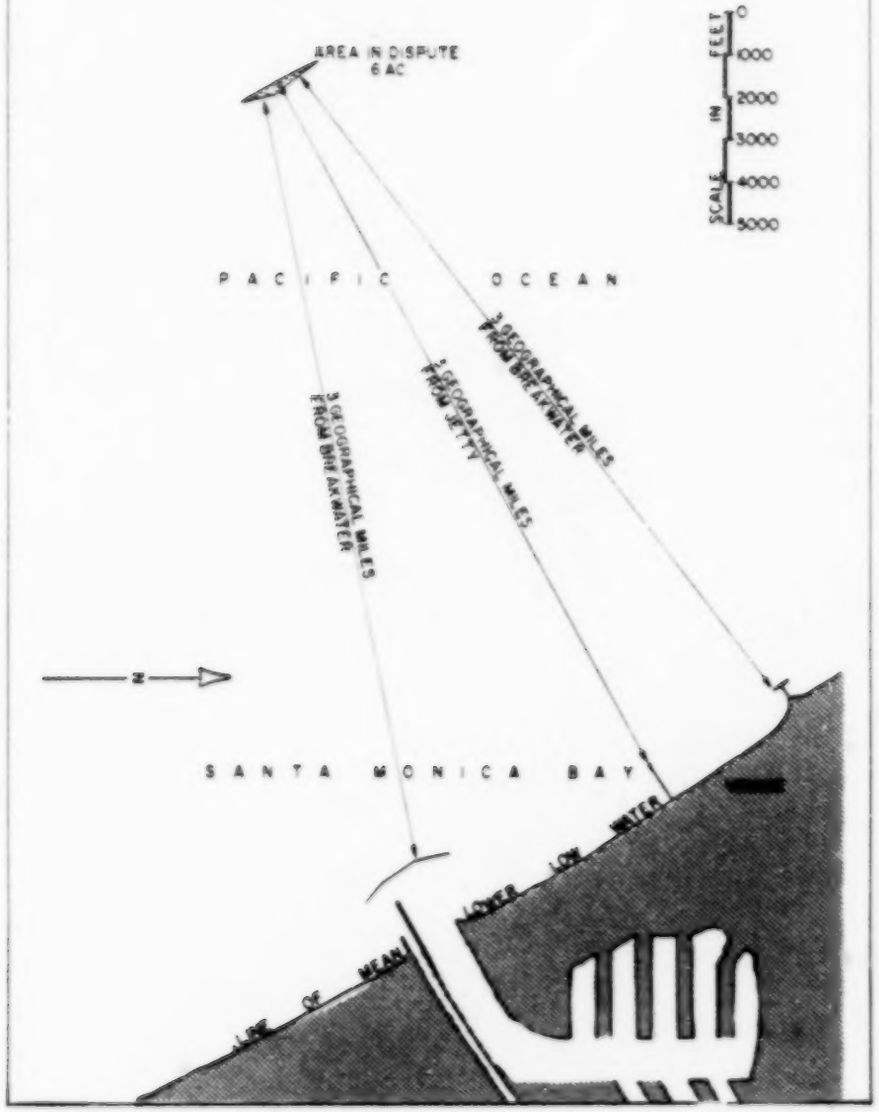


Figure 11
THE EL SEGUNDO PIER

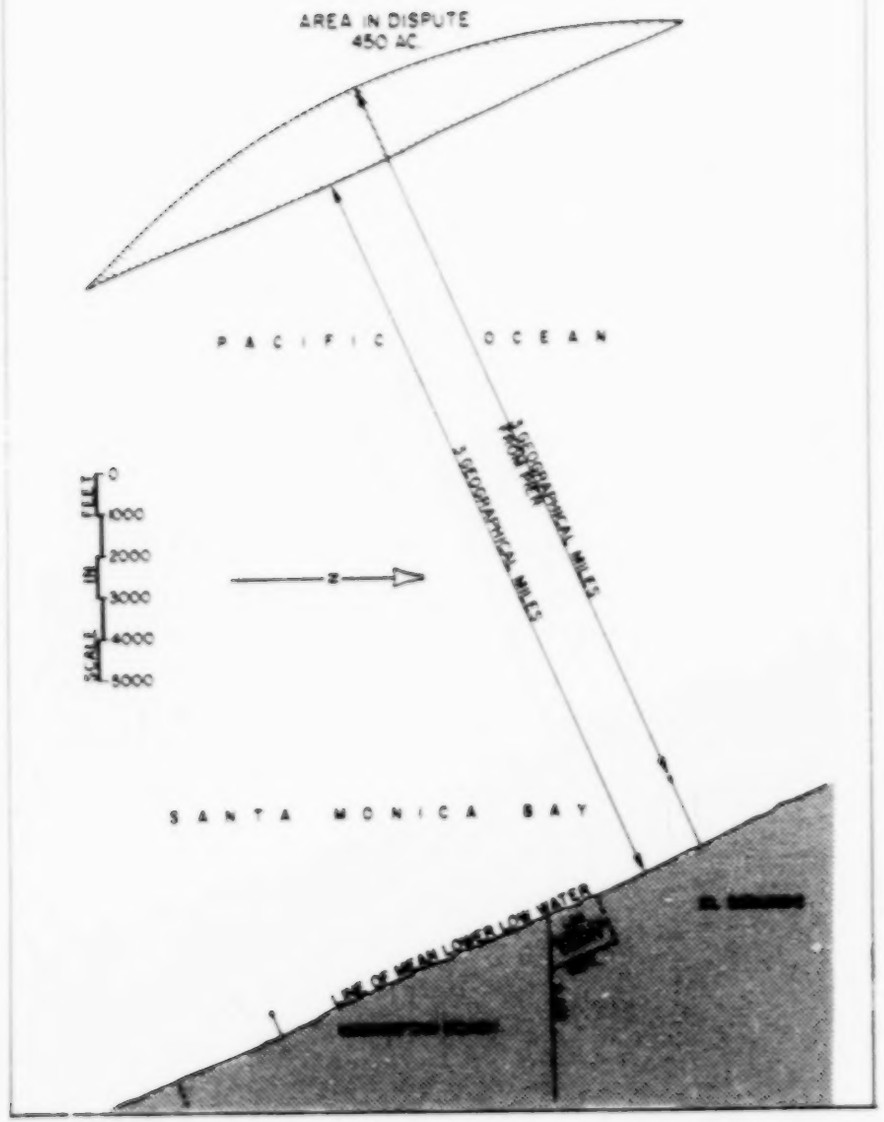


Figure 12
MANHATTAN BEACH PIER

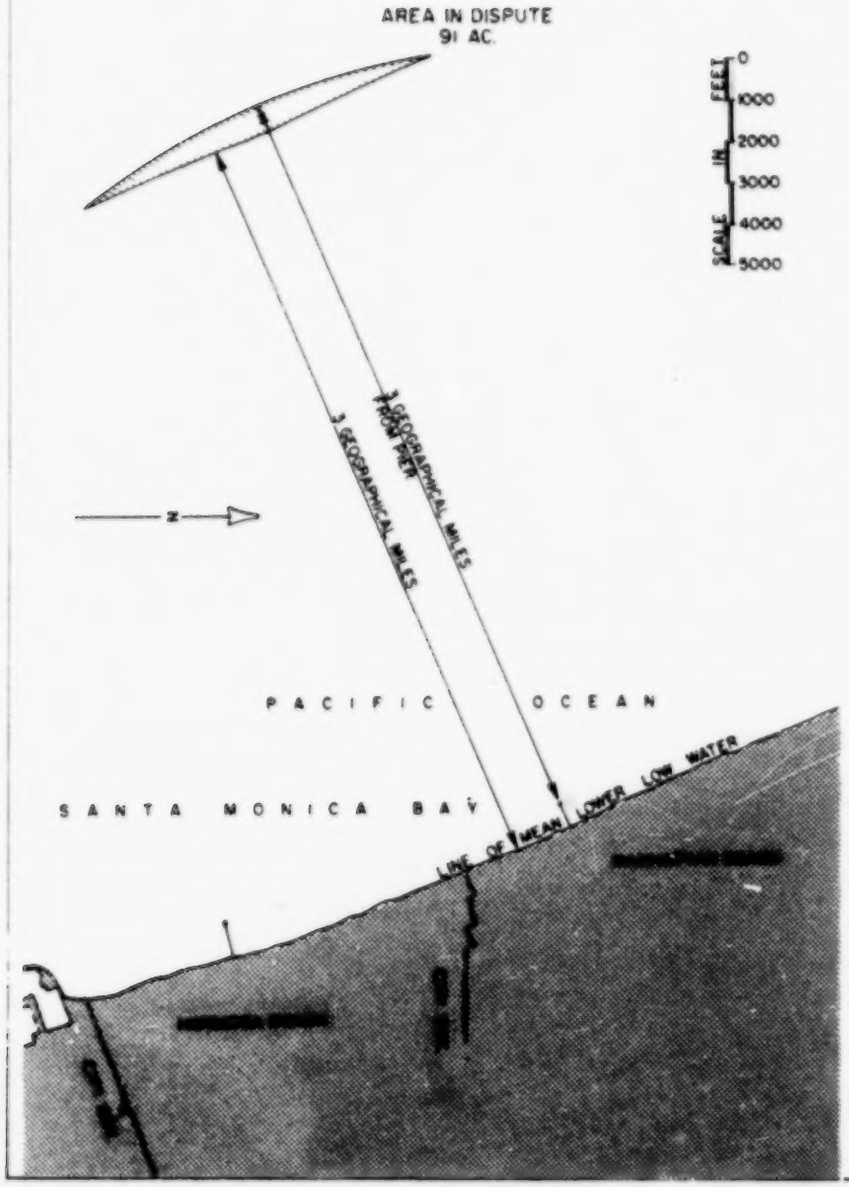


Figure 13
THE HERMOSA BEACH PIER

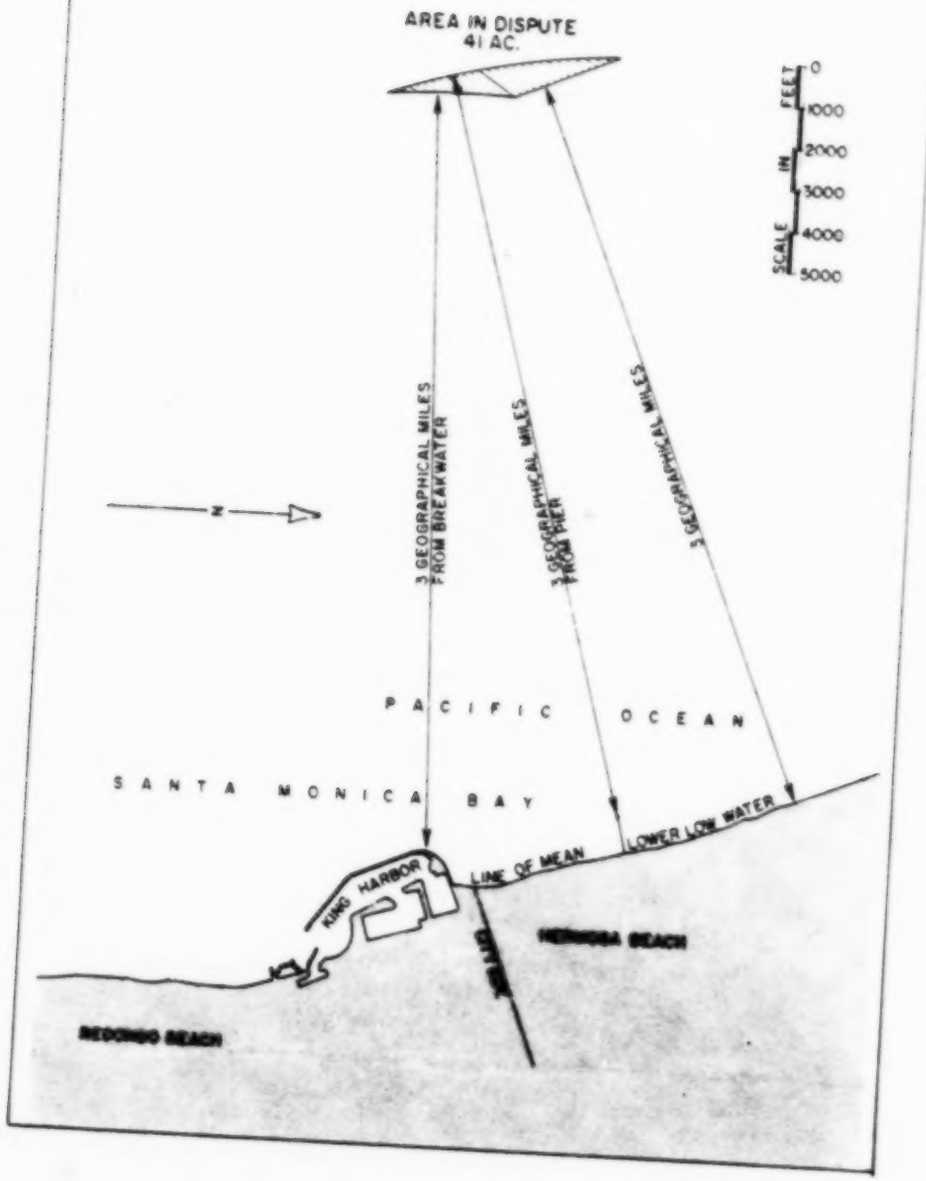


Figure 14
THE HUNTINGTON BEACH PIER

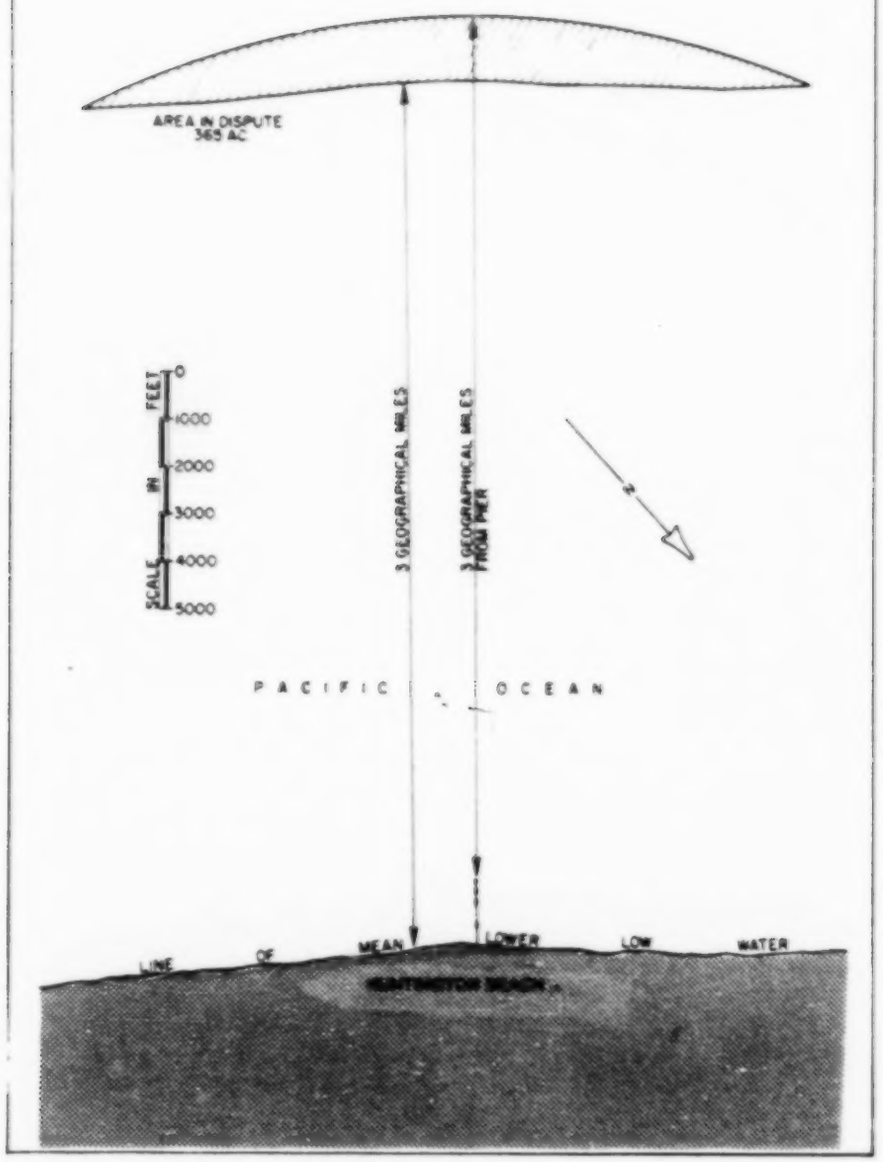


Figure 15
THE NEWPORT BEACH PIER

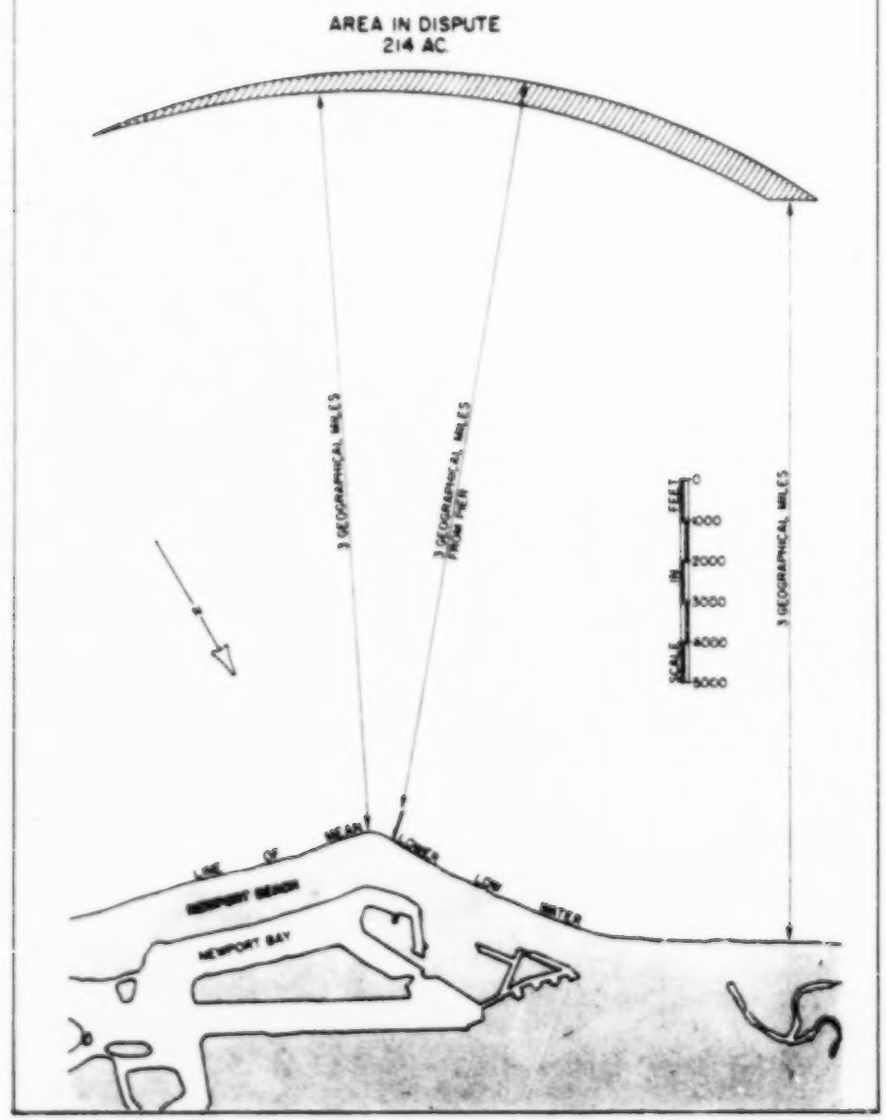


Figure 16
THE BALBOA BEACH PIER

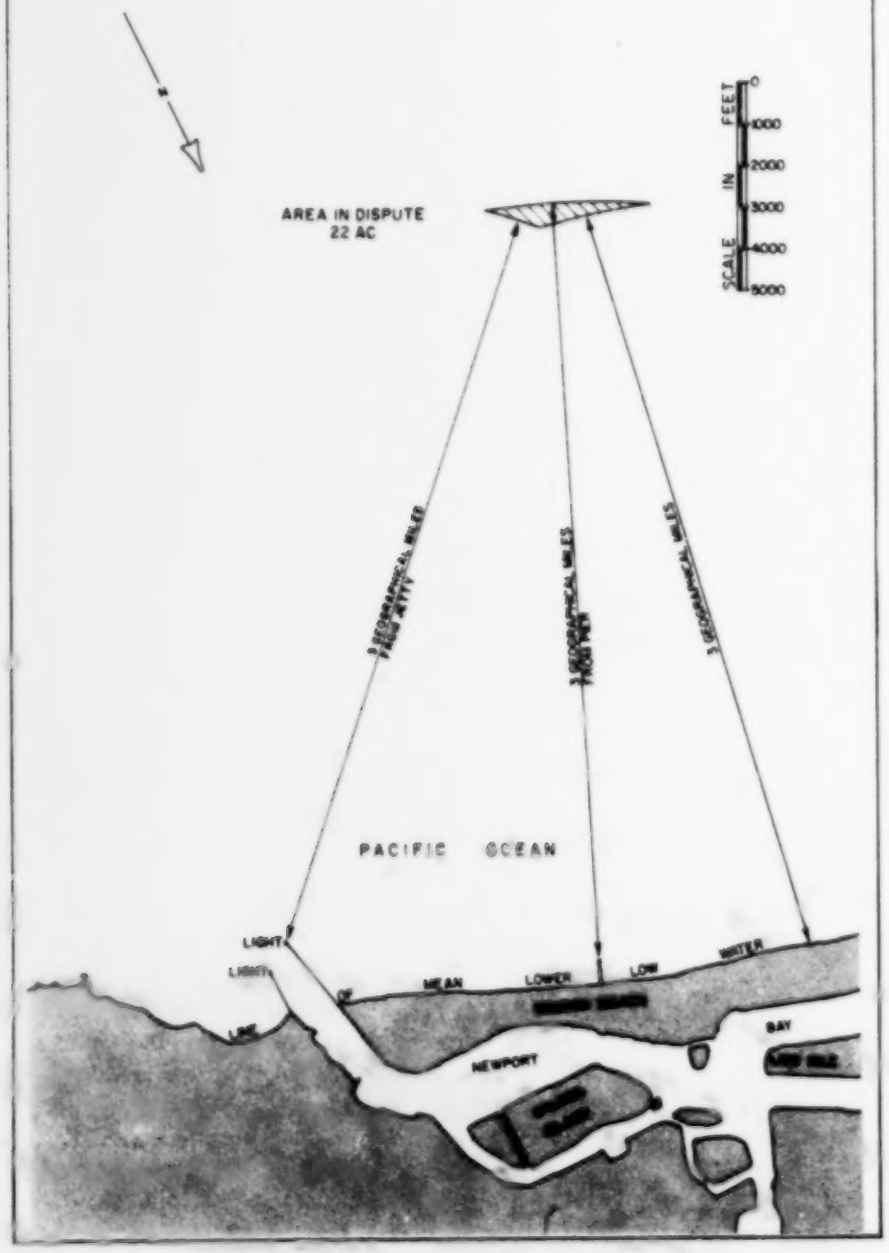


Figure 17
THE OCEANSIDE PIER

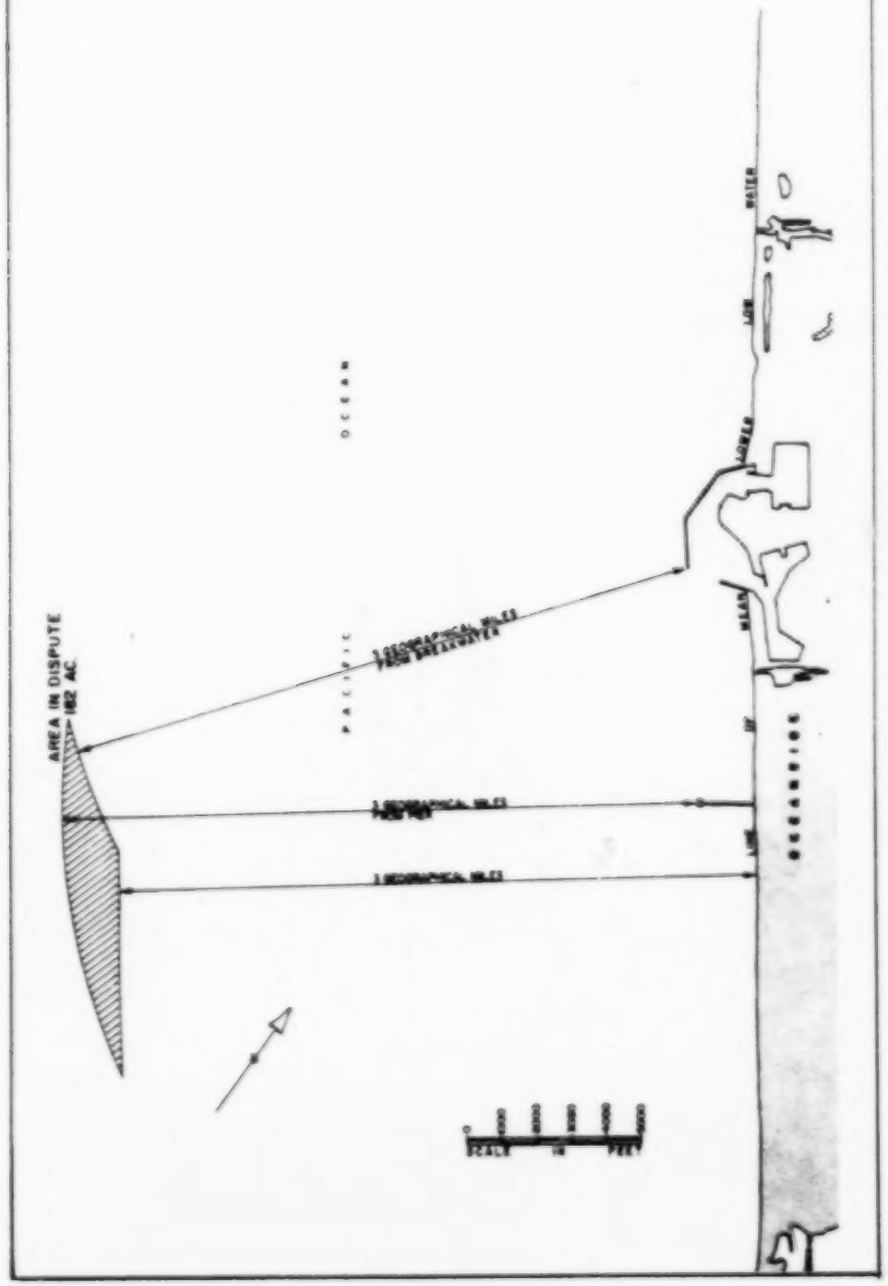


Figure 18
THE OCEAN BEACH PIER

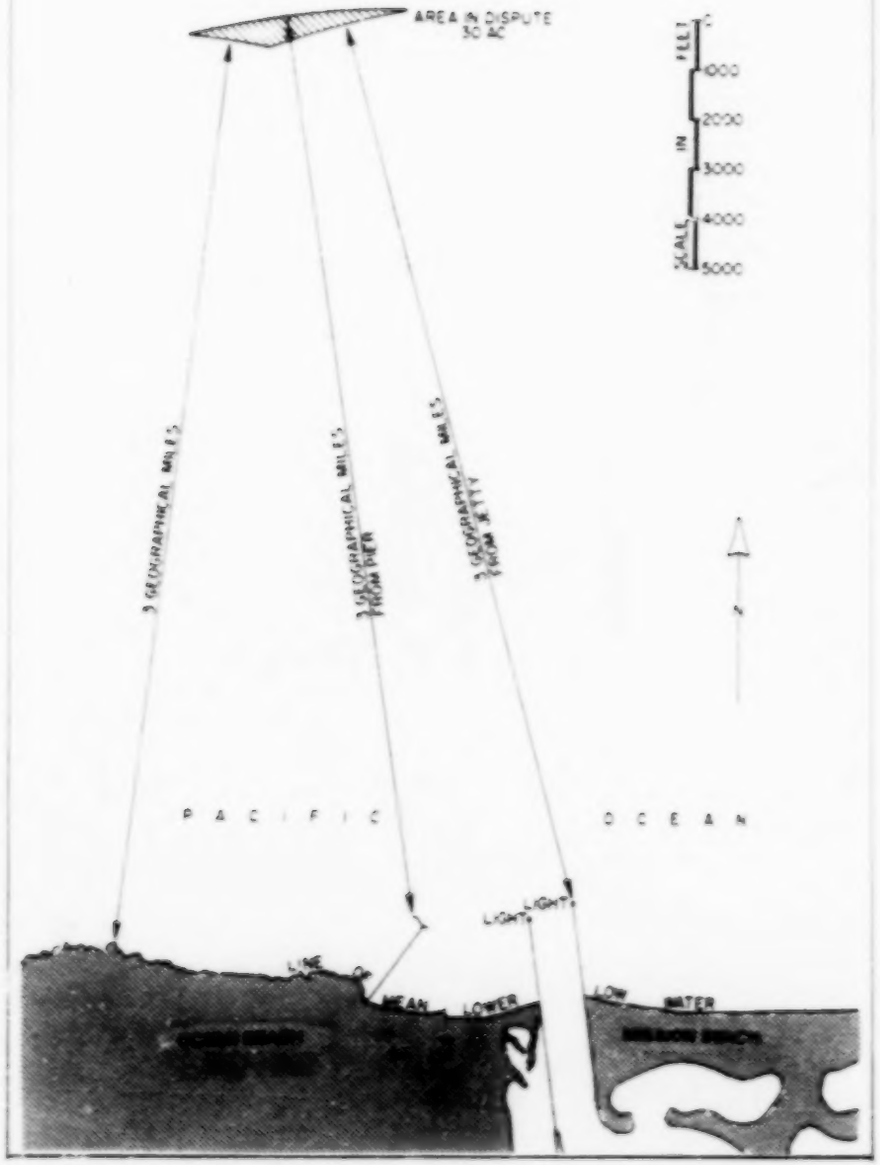
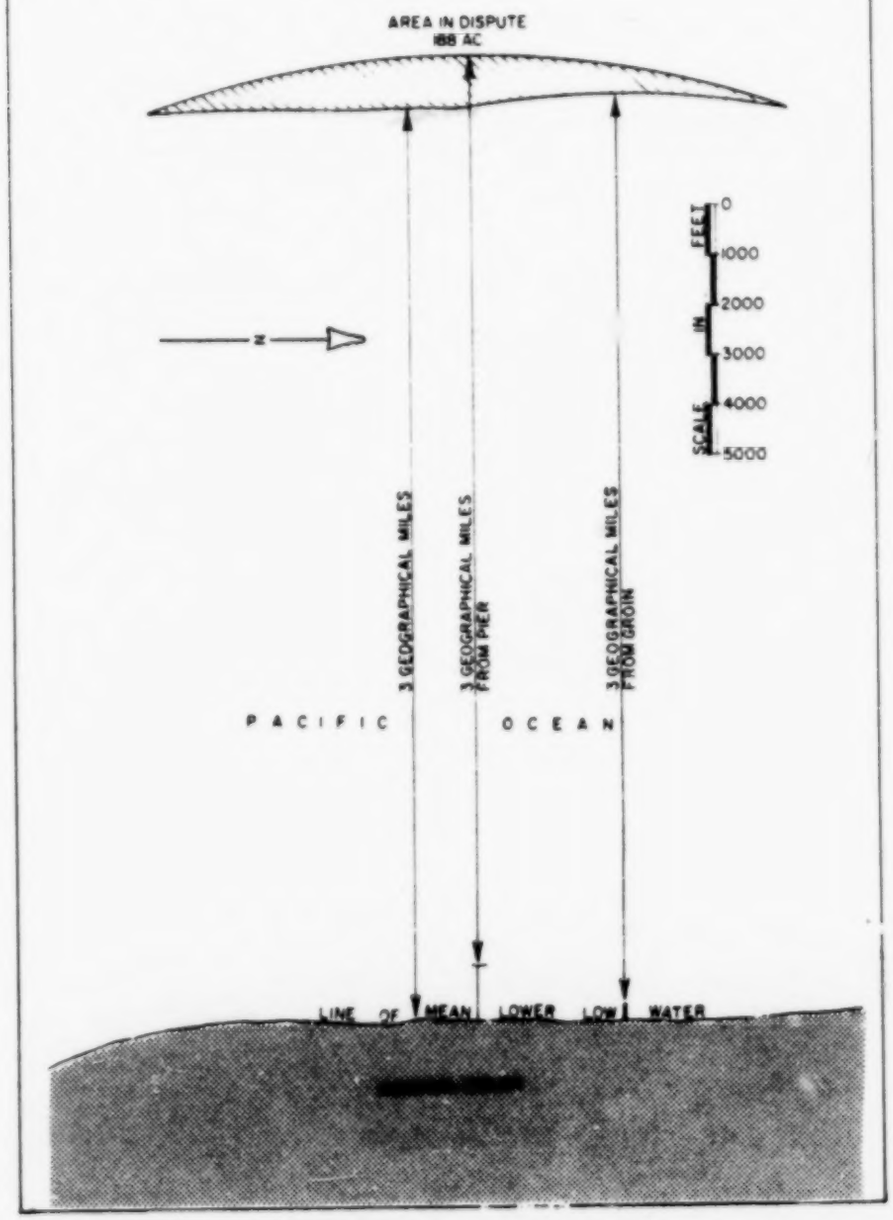


Figure 19
THE IMPERIAL BEACH PIER



[Pier shown as part of the coast line for purposes of delimiting the territorial sea.]

Figure 20
STATE DEPARTMENT DIAGRAM